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Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court

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I. INTRODUCTION

The United States Supreme Court's role as final interpreter of the laws and Constitution of the United States makes it the most important judicial body in the world.¹ This Article will advance a proposal to change the term of office of the Justices who wield this power.

Individuals view the law differently. This is true even when they serve as judges, including service as Justices of the United States Supreme Court. For illustration of this point, consider the Court's 1985 term.² Of the 159 cases decided with full opinion,³ the members of the Court disagreed as to disposition in 113, or over seventy-one percent of the total.⁴ In an additional sixteen cases, the members of the Court were able to agree as to disposition, but found it necessary to explain their rationale in separate opinions.⁵ In the bulk of the cases, the Justices sitting in decision, all sworn to uphold the same laws and Constitution, and informed by the same precedents, were unable to agree.⁶ In thirty-six of these cases—nearly one quarter of the total—the Court divided 5–4, so that the changed vote of a single Justice could have changed the disposition of the case and the Court's holding.⁷

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1. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). It is not a purpose of this Article to consider whether the Court has improperly assumed legislative functions in its exercise of this role. See, e.g., L. Hand, *The Bill of Rights* 10–30 (1958); Berger, *The Role of the Supreme Court*, 3 U. ARK. LITTLE ROCK L.J.; 1 (1980); Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383 (1985).

2. The 1985 term is the most recent for which the *Harvard Law Review* has published its annual statistical analysis of the Court's actions. The classifications of cases *infra* in notes 3, 4, 5, 7, and accompanying text, are those found in *The Supreme Court, 1985 Term*, 100 HARV. L. REV. 1, 304–07 (1986).

3. *Id.* at 304. This includes 13 per curiam opinions.

4. *Id.* at 306.

5. *Id.*

6. There is some dispute regarding whether the level of disagreement among Justices is increasing. While conceding that "the number and length of separate and dissenting opinions continue to increase," Professor Easterbrook argues that "[t]he pertinent measure of disagreement on such a court is disagreement about the nature of [legal] principles." Easterbrook, *Agreement Among The Justices: An Empirical Note*, 1984 SUP. CT. REV. 389, 389–90. Professor Easterbrook's analysis led him to conclude that "[t]he rate of real disagreement hovers around 20 percent and has not risen in forty years." *Id.* at 392.

7. *The Supreme Court, 1985 Term*, 100 HARV. L. REV. 1, 307 (1986). See *infra* notes 57–59 and accompanying text for further discussion of the Court's 5–4 decisions during the 1985 term.

The foregoing discussion serves to underscore a fact that is readily apparent to anyone who has studied law in this country, and is recognized increasingly by the general American population: The identity of the individuals who sit on the United States Supreme Court controls to a great degree the decisions and opinions rendered by the Court. Furthermore, given the frequency of cases in which the Court is almost evenly divided, the identity of *each* Justice is an important determinant of the Court's course of decision.⁸

Since the United States Constitution took effect in 1789, Justices of the United States Supreme Court have enjoyed life tenure "during good Behavior,"⁹ apparently subject to removal only by impeachment proceedings,¹⁰ a process never successfully invoked against a Justice.¹¹ It is not self-evident that the nation is best served by a system of life tenure for Supreme Court Justices.¹² The purpose of this Article is to propose a constitutional amendment which would replace life tenure for Supreme Court Justices with a system of fixed, staggered terms. The resulting system would be fairer, more rational, and less subject to inappropriate manipulation.

II. AN OUTLINE OF THE PROPOSAL

The primary features of the proposal are that Justices should serve for staggered eighteen-year terms, and that if a Justice did not serve his¹³ full term, a successor would be appointed only to fill out the remainder of the term. Reappointment would be barred in all cases. The proposal might be carried out by a constitutional amendment employing the following language:

PROPOSED AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section 1. Justices of the United States Supreme Court shall hold their offices during good behavior, for the terms specified herein.

8. "[T]he individual Supreme Court Justice probably has more actual power than any other individual in American public life except the President." J. FRANK, *MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE* 8-9 (1958).

9. U.S. CONST. art. III, § 1. The Constitution does not explicitly provide life tenure for federal judges, stating only that they "shall hold their Offices during good Behavior." This language generally has been regarded as establishing life tenure. See, e.g., Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 697 (1969): "I am quite convinced that it would be unconstitutional for the Congress to attempt, by legislation, to establish a fixed term of office for judges of the federal constitutional courts." The existence and scope of a constitutional requirement of life tenure is a subject of debate. See *infra* notes 72-74 and accompanying text. For purposes of this Article, it is assumed that abolition of life tenure could be achieved only by a constitutional amendment.

10. U.S. CONST. art. II, § 4. The stated grounds for removal of judges and other federal officials are "Treason, Bribery, or other high Crimes and Misdemeanors." *Id.* Impeachment proceedings must be initiated in the House of Representatives. U.S. CONST. art. I, § 2, cl. 5. The Senate tries impeachment proceedings, and conviction requires a two-thirds majority of the members present. U.S. CONST. art. I, § 3, cl. 6.

It is unclear whether federal judges may be removed for failure of good behavior without commission of an impeachable crime. See *infra* notes 72-74 and accompanying text. No Supreme Court Justice has ever been removed for any reason.

11. The House of Representatives impeached Justice Samuel Chase in 1804, but the Senate vote in 1805 fell short of the two-thirds vote required for conviction. I C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 276-91 (1922).

12. Judges of inferior federal courts also enjoy life tenure. U.S. CONST. art. III, § 1. Certain federal judges, e.g., judges of the Tax Court, are not "Article III judges" and do not enjoy life tenure.

The considerations regarding life tenure for inferior judges are considerably different from those in the case of Supreme Court Justices, and the proposal advanced in this Article is directed at only the latter. See *infra* notes 162-69 and accompanying text for further discussion of this point, and of the possibility of ending life tenure for inferior federal judges.

13. Due to the inadequacy of the English language, and to the awkwardness of the "he or she" formulation, throughout this Article masculine pronouns are used to refer to persons of indefinite gender, and thus, depending on the context, may include females and legal entities. See 1 U.S.C. § 1 (1982), which employs the same approach.

Section 2. The term of office of the Associate or Chief Justice who is most senior in term of service on the Court at the date on which this article becomes effective shall expire on the first day of August of the third odd-numbered year following the date on which this article becomes effective. The term of office of one of the remaining Justices shall expire each two years thereafter, in order of seniority on the Court, the term of the most senior expiring first. In the event that any position on the Court is vacant at the time this article becomes effective, the tenure of office of the Justice appointed to fill the vacancy shall be determined as if the Justice were the least senior member of the Court on the date on which this article becomes effective.

Section 3. Upon expiration of the term of office of any Justice, a new Justice shall be appointed whose term of office shall expire eighteen years after the expiration of his predecessor's term of office.

Section 4. In the event any Justice fails to complete his term of office, whether the Justice takes office before or after the effective date of this article, a successor shall be appointed as provided in Section 2 of Article II, but the term of office of any such successor shall expire at the same time as that of the Justice whom he replaces. In the event that two or more positions on the Court are vacant at any time, the President shall designate which position each appointee is to occupy.

Section 5. Notwithstanding any other provision of this article, if a Justice is appointed to a term of office which (but for this section) would expire during the current term of office of the President by whom he is appointed, that Justice's term of office shall expire eighteen years after the date on which (but for this section) it would have expired.

Section 6. Whenever the office of Chief Justice shall be vacant, the President may appoint an Associate Justice to that position. The term of office of the Chief Justice so appointed will nevertheless expire on the same date on which that individual's term of office would have expired had he not been appointed Chief Justice, and that of the newly appointed Associate Justice will expire on the same date as if he had been appointed Chief Justice.

Section 7. In no event shall any Justice, or any former Justice, be appointed a second time to service on the United States Supreme Court.

Section 8. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years of its submission to the States by the Congress.

Certain features of the language of the proposed amendment are not essential, and alternatives are discussed below.¹⁴ These issues include the possibility of a provision establishing the size of the Court,¹⁵ the exact length¹⁶ and starting date¹⁷ of Justices' terms, the manner of phasing in the new system,¹⁸ treatment of Justices who are appointed to serve only a short period of a predecessor's term of office,¹⁹ treatment of the office of Chief Justice,²⁰ and various alternatives designed to assure the independence of the Court.²¹ Although the subject is generally beyond the scope of this Article, the possibility of ending life tenure for inferior federal judges is discussed briefly.²²

14. See *infra* notes 117-61 and accompanying text.

15. See *infra* notes 119-26 and accompanying text.

16. See *infra* notes 117-18 and accompanying text.

17. See *infra* note 127 and accompanying text.

18. See *infra* notes 128-35 and accompanying text.

19. See *infra* notes 144-49 and accompanying text.

20. See *infra* notes 150-53 and accompanying text.

21. See *infra* notes 150-61 and accompanying text.

22. See *infra* notes 162-69 and accompanying text.

III. POLITICAL BENEFITS OF THE PROPOSED AMENDMENT

The writer's primary objective in putting forth the proposed amendment is obtaining certain improvements that might be termed "political benefits." This term is not meant to connote partisan benefit for any party or viewpoint, but rather benefit to the political system in the sense that it would operate in a fairer and more rational manner. Throughout the development of the proposal, these political benefits have been kept in mind, and alterations in the present system have been proposed only to the extent necessary to achieve them.

The purpose of this section of the Article is to outline these political benefits. These benefits include slightly changed behavior on the part of Presidents and significantly changed behavior on the part of Justices. Most important of all, the proposed amendment would tend to equalize the power of Presidents in shaping the Court. For clarity of presentation, the political benefits are offered in ascending order of importance.

A. Effect on Presidential Appointment Decisions

It is clear that Presidents regard the appointment of Justices as important.²³ An appointment gives a President an opportunity to affect the Court's future decisions, including decisions after his term of office has ended,²⁴ by naming Justices of like mind to the President.²⁵ Under the proposal, there is no reason to think, of course, that Presidents will employ a decision-making process which is less political or partisan than that presently employed.²⁶ Under the present system, however, a

23. During his remarks at the investiture of Chief Justice Burger, President Nixon stated:

When we consider what a Chief Justice has in the way of influence on his age and the ages after him, I think it could fairly be said that our history tells us that our Chief Justices have probably had more profound and lasting influence on their times and on the direction of the Nation than most Presidents have had. You can see, therefore, why I consider this decision to be so important.

1969 PUB. PAPERS 388.

In a less formal setting, President Eisenhower recognized the importance of Supreme Court appointments in characterizing his appointment of Chief Justice Warren as "the biggest damfool mistake I ever made." R. GRIFFITH, *LEE'S LETTERS TO A FRIEND* 134 (1984).

24. The White House counsel in the Reagan administration, Mr. Fred Fielding, noting that President Reagan may have named over half the federal judiciary by the time he leaves office, terms these appointments "a legacy that will last long beyond his administration." Freidman and Werneil, *Reagan Appointments to The Federal Bench Worry U.S. Liberals*, Wall St. J., Sept. 6, 1985, at 1, col. 1.

25. As Attorney General Robert Kennedy described the decision-making process in the Kennedy Administration: You wanted someone who generally agreed with you on what role government should play in American life, what role the individual in society should have. You didn't think about how he would vote in a reapportionment case or a criminal case. You wanted someone who agreed generally with your view of the country.

J. CLAYTON, *THE MAKING OF JUSTICE* 52 (1964).

Currently, President Reagan, like President Nixon, apparently wishes to increase the number of "strict constructionists" on the Court. W. VALIS, *THE FUTURE UNDER PRESIDENT REAGAN* 58-59 (1981); 1970 PUB. PAPERS 39-40. Indeed, some political commentators viewed the President's power to fill vacancies on the Court as the most significant consequence of the 1984 election. See, e.g., I. Kaufman, *Keeping Politics Out of the Court*, N.Y. Times, Dec. 9, 1984, § 6, at 72; S. Taylor, *Whoever is Elected, Potential is Great for Change in High Court's Course*, N.Y. Times, Oct. 21, 1984, at 30.

26. The author is not unsympathetic to the goal of devising a structure in which judicial appointments are based more on merit and less on political considerations. However, the proposals in this Article are not directed at that goal.

Various proposals are designed to reduce the political element in selection of Justices. For example, one observer has suggested a committee chaired by the Chief Justice (or an Associate Justice selected by his brethren when the office of Chief Justice were vacant) and to include seven laymen selected by the President and seven lawyers elected by the

President desiring to exert the greatest possible influence on the Court through an appointment²⁷ will have an incentive to choose a relatively young candidate. If Franklin Roosevelt wished for the principles of the New Deal to long be represented on the Court, he could hardly have made a wiser choice than William O. Douglas, who not only was of like political mind to President Roosevelt,²⁸ but was only forty years of age when appointed in 1939.²⁹ Douglas' youth at the time of his appointment was an almost essential ingredient in his achieving the longest tenure on the Court in its history.³⁰ While it is not asserted that the appointment of Justice Douglas was based entirely or even principally on his youth, there is evidence that Presidents³¹ (or even the potential appointees themselves³²) may take age into account in deciding on a Supreme Court appointment.

American Bar Association. The committee would draw up a list from which the President would choose. Schrader, *Judicial Selection: Taking the Courts Out of Politics*, 46 A.B.A. J. 1115, 1118 (1960).

The American Bar Association's present procedures for ranking proposed Justices (and inferior federal judges) according to qualification reduce to some degree the political content in the presidential decision regarding an appointment. This process is described in American Bar Association, *Standing Committee on Federal Judiciary: What It Is and How It Works* (1977).

27. The President's power to appoint Justices is limited by the constitutional requirement of Senate confirmation. See U.S. CONST. art II, § 2, cl. 2. "That the Senate takes its confirmation role seriously is documented by its refusal to confirm 26 of the 136 Supreme Court nominees forwarded to it." H. ABRAHAM, *JUSTICES AND PRESIDENTS* 31 (1974). Since Professor Abraham's book appeared, the Senate has confirmed the elevation of Chief Justice Rehnquist and the appointment of Justices Stevens, O'Connor, and Scalia, and has rejected no appointees.

John Rutledge, who was twice appointed to the court by President Washington, holds the dubious distinction of appearing in the lists of both confirmed and rejected appointees. Justice Rutledge was confirmed in 1789, but resigned in 1791 to become Chief Justice of the Supreme Court of South Carolina. In 1795, he was appointed Chief Justice of the United States and served 4-1/2 months while Congress was in recess, but the Senate then voted against confirmation. See R. BARRY, *MR. RUTLEDGE OF SOUTH CAROLINA* 352-58 (1942).

28. Justice Douglas was, for example, Chairman of the Securities and Exchange Commission, a New Deal creation, at the time of his appointment to the Court.

29. R. HODDER-WILLIAMS, *THE POLITICS OF THE U.S. SUPREME COURT* 185 (1980).

30. Justice Douglas was appointed to the Court in 1939 at age 40. He retired in 1975, after serving over 36 years, the longest tenure in the history of the Court. The length of Justice Douglas' tenure resulted in part from the fact that he remained on the Court to the relatively advanced age of 77. However, his youth at the time of his appointment was also an essential factor. Twenty-one former Justices and three Justices on the Court at the beginning of the 1986 term have served to age 77 or older (Justice Holmes served to age 90), but none matched Douglas' length of tenure because all were older, usually considerably older, when they took their seats on the Court. *Id.* at 183-85.

31. President Eisenhower established an upper age limit for Justices of 62 years, at least absent "unusually impressive" qualifications. D. EISENHOWER, *THE WHITE HOUSE YEARS: MANDATE FOR CHANGE, 1953-1956* 227 (1963). In fact, only one of President Eisenhower's five appointees (Chief Justice Warren) was over age 56, and one, Justice Stewart, was the second youngest Justice (after Justice Douglas) appointed to the Court since before the War Between the States. R. HODDER-WILLIAMS, *supra* note 29, at 184-85. The concern for youth appears to continue to the present. The new Justices appointed by President Reagan were younger than the historical averages, and Judge Easterbrook of the Seventh Circuit, who is less than 40, is a leading candidate for the next vacancy. See *infra* note 75 and accompanying text and note 140. See also *infra* note 163 regarding the youth of the inferior judges appointed by President Reagan.

On one occasion, in what may well have been historically unique circumstances, a potential Chief Justice's youth may have worked against him. In the summer of 1910, Chief Justice Fuller died. It was at first assumed that President Taft would promote Justice Hughes, then 48 years of age, whom he had named to the Court a few months before and to whom he almost had promised the Chief Justiceship should it become vacant. Instead, President Taft decided to promote 65-year-old Justice White. The suggestion is that President Taft selected White as Chief Justice over the younger Charles Evans Hughes in part because of his hope that he himself might someday occupy the position of Chief Justice. If so, President Taft's hopes came to fruition when President Harding named him to succeed Chief Justice White following the latter's death in 1921. Ironically, Hughes left the Court in 1916 but returned to succeed Taft as Chief Justice in 1930. See H. ABRAHAM, *supra* note 27, at 159-60; Mason, *President by Chance, Chief Justice by Choice*, 55 A.B.A. J. 35 (1969).

32. Senator Garland of Arkansas is reported to have advised President Cleveland that he (Garland) regarded himself as disqualified for a Supreme Court appointment because a Justice should serve at least 20 years, and he doubted he would live that long. J. FRANK, *supra* note 8, at 42.

It is not suggested that under the proposed amendment Presidents would, or necessarily should, ignore age in deciding on an appointment to the Court. If a President wished for his appointee to exercise continuing influence for as long as possible, a President would prefer to appoint as Justice someone young enough that it would be reasonable to expect that good health and sufficient vigor for a demanding job would continue for eighteen years. However, that standard would seem to apply to most healthy individuals in their mid-fifties. Because the proposed amendment would reduce any preference for very young candidates, it would be more likely that the appointment would be made on the basis of the relative qualifications of the potential appointees.³³ In the case of an appointment to finish out an uncompleted term, the age of the potential appointee would be even less important. For example, a President might very well consider a distinguished appeals court jurist of seventy for a three-year appointment on the Supreme Court, when his appointment for eighteen years (or for life under the present system) would be unrealistic.³⁴

The writer does not mean to overstate the effect of the proposed amendment on presidential appointments. Under the present system, very few wunderkinder have been appointed,³⁵ and most Justices have served less than eighteen years.³⁶ At least in the case of appointments to full eighteen-year terms, the proposal would be expected to have only a marginal effect—but, it is submitted, marginally positive—on the presidential appointment decision. The difference made by the proposal would be problematic and far removed, since it could in no event affect decisions of the Court for at least eighteen years.

33. Some clarification may be necessary. It is not suggested that the increased physical vigor normally associated with relative youth is an insignificant asset in considering an individual's fitness for the extremely demanding position of Justice. That factor could still be given whatever weight the President thought appropriate. The significant difference is that unlike the present system, if the President concluded that the older candidate was better qualified for service for a considerable number of years, he would not be tempted to choose a somewhat less qualified candidate whose youth would allow even longer service.

It also should be acknowledged that reducing youth as a factor in the appointment process does not automatically mean that the President's inquiry will be limited to factors touching on the potential appointee's relative qualifications. Political considerations may control the decision. However, the present system allows a President to make an appointment based on factors other than qualifications. To the degree factors other than the qualifications of those under consideration are reduced—and it is submitted that the proposal would reduce the importance of one such extraneous factor—it becomes likely that relative qualification will become the dominant factor in the selection.

34. It might be argued that the proposal would put a premium on youth, especially for appointments of relatively short duration. The possibility exists that a President in his first term might hope to influence indirectly a Justice's actions on the Court by naming a young person to a short, incomplete term, which would end during what could be the President's second term. The danger would be that the young Justice would not want to alienate a President from whom he might later seek appointment to another position. This potential problem, and possible modifications of the proposed amendment to deal with the problem, are discussed *infra* at notes 144–49 and 154–61 and accompanying text.

35. Only 11 Justices were younger than 45 years of age when they took their seat, and only four of these were appointed after the War Between the States. The youngest Justices in history, both aged 32 when they joined the Court, were Justices Johnson and Story, both of whom joined the Court early in the nineteenth century. R. HODDER-WILLIAMS, *supra* note 29, at 183–85.

36. Both the mean and median terms of service on the Court have been approximately 15 years. *Id.* These figures would be very slightly increased when adjusted for the retirements of Justice Stewart and Chief Justice Burger, who served, respectively, approximately 23 and 17 years before retirement. Moreover, the present members of the Court will pull up the average somewhat. If the eight Associate Justices on the Court at the close of the 1985 term had all joined Chief Justice Burger in retiring at that time, both their mean and median time on the Court would have exceeded the historical averages.

B. Effect on Resignation Decisions of Justices

While the effect of the proposed amendment on presidential appointment decisions could be expected to be minor, its effect on the retirement (or resignation) decisions of certain Justices could be significant. A Justice considering retirement from the Court at some point within a few years, but not faced with medical or other personal urgency, might well reflect on how his successor would affect the future course of decision by the Court. In such a situation, the Justice might attempt to time his retirement so that his successor would be named by a President sympathetic to (or, at least, not unsympathetic to) the retiring Justice's view of the Constitution.

It is submitted that this influence on the selection process by retiring Justices is wholly inappropriate. The justification of life tenure relates to the independence of the Justice while he is on the Court.³⁷ Allowing the outgoing Justice a measure of control over the naming of his successor allows him an unchecked power entirely unnecessary to protect his independence of action while on the bench, and in the writer's view cannot be justified.³⁸

It is impossible to know the degree to which retirement decisions of individual Justices may have been influenced by this factor. Due to the fact that such influence may be regarded as improper, or at best questionable, on-the-record statements by Justices are not to be expected.³⁹ The most widely known episode in recent years in which the inference was allowable that a retiring Justice desired to influence the selection of his successor involved Chief Justice Warren. According to some observers,⁴⁰ Warren, although a Republican, felt alienated from the Republican Party (which seemed likely to regain the White House in the 1968 election) and identified closely with President Johnson and the Great Society. In a private meeting with President Johnson in the summer of 1968, Warren indicated his intention to retire and that "he wanted President Johnson to appoint his successor, someone who felt as Justice Warren did."⁴¹ Moreover, the resignation was not to be effective until a

37. See *THE FEDERALIST*, No. 78, at 525 (A. Hamilton) (Ford ed. 1898):

That inflexible and uniform adherence to the rights of the Constitution and of individuals, which we perceive to be indispensable to the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence.

38. *New Republic* Magazine—not normally noted as an opponent of Chief Justice Warren, but concerned about his apparent efforts to influence the choice of his successor (see *infra* notes 40–43 and accompanying text)—argued: "Life tenure, specified in the Constitution and undoubtedly essential, is one thing; life tenure with a right to influence confirmation of a successor is rather another." *NEW REPUBLIC*, July 20, 1968, at 12.

39. The evidence discussed *infra* in notes 40–44 and accompanying text indicates that Chief Justice Warren discussed with President Johnson the matter of a successor Chief Justice. Yet in an interview a few days after his resignation had been announced, Chief Justice Warren denied any such discussion. A reporter asked: "Mr. Chief Justice, did you have any discussion with the President about a successor?" Chief Justice Warren replied: "No, I did not have." *Earl Warren Talks About the "Warren Court,"* U.S. NEWS AND WORLD REPORT, July 15, 1968, at 62–63. The most likely reasons for Chief Justice Warren's blatant, unqualified denial would appear to be either a belief on his part that the discussions were improper, or a recognition that many others would view his actions as improper.

40. The account given here draws heavily on G. WHITE, *EARL WARREN: A PUBLIC LIFE* 306–08 (1982), and on B. SCHWARTZ, *SUPER CHIEF* 680–83, 720–25 (1983).

41. Jones, Memorandum for the Record, June 13, 1968. LBJ Library. The *Wall Street Journal* reported following the meeting that Chief Justice Warren was considering retirement and "hoped to have a voice in naming his successor." *Wall St. J.*, June 14, 1968, at 1, col. 5, quoted in G. WHITE, *supra* note 40, at 307. Professor White concluded that Warren expected the nomination of Justice Fortas, a man for whom he had developed friendship and with whom he was

successor was qualified, leaving open the possibility that Chief Justice Warren would stay on the Court if President Johnson were unable to secure the confirmation of a new appointee in the waning months of his presidency.⁴² Although both Chief Justice Warren and his would-be successor nominated by President Johnson, Justice Fortas, left the Court in the wake of the unsuccessful effort to secure Fortas' confirmation,⁴³ the episode indicates that Warren was doing more than stepping aside and allowing the political process to produce a successor. At a minimum, the evidence suggests that a factor in the timing of Chief Justice Warren's resignation, in 1968 rather than, say, 1969 or 1970, may have been the hope that his successor would be named by President Johnson rather than President Nixon.⁴⁴

Similarly, Justice Douglas, who became very ill during the term of President Ford, stayed on the Court after it was apparent to most observers, and to the other Justices, that he was incapable of discharging his duties.⁴⁵ He is quoted as having told a friend: "I won't resign while there's a breath in my body—until we get a Democratic President."⁴⁶ Earlier, Chief Justice Taft concluded that despite being "older and slower and less acute and more confused," he "must stay on the Court in order to prevent the Bolsheviks from getting control."⁴⁷

It is impossible to know how often this consideration affects the timing of a Justice's⁴⁸ retirement, or his decision not to retire.⁴⁹ It is not suggested that the hope of some degree of control, normally quite indirect,⁵⁰ concerning the appointment of

impressed. *Id.* at 308. Justice Goldberg reportedly stated that Chief Justice Warren had told him that he (Warren) had recommended that President Johnson appoint Goldberg as Chief Justice. B. SCHWARTZ, *supra* note 40, at 720.

42. Chief Justice Warren did not seek to remain in office indefinitely. Instead, he worked out an arrangement with the incoming Nixon Administration under which Warren completed the 1968 term and President Nixon named a successor to take office for the 1969 term. B. SCHWARTZ, *supra* note 40, at 724–25.

43. See G. WHITE, *supra* note 40, at 308; B. SCHWARTZ, *supra* note 40, at 720–25.

44. See B. SCHWARTZ, *supra* note 40, at 682.

45. See *infra* notes 84 and 90, and sources there cited, regarding Justice Douglas' illness and the response of the other Justices to Douglas' decision to stay on the Court.

46. Douglas Finally Leaves the Bench, TIME, Nov. 24, 1975, at 69.

47. 2 H. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 967 (1939).

48. This factor is not limited to Supreme Court Justices, but also affects inferior federal judges. See Major, *Why Not Mandatory Retirement for Federal Judges?*, 52 A.B.A. J. 29, 29–30 (1966). The author, then Senior Judge of the Court of Appeals for the Seventh Circuit, wrote:

In the mid-1940's, I attended the Judicial Conference of the United States . . . and I was appalled at the decrepit condition of some of its members

. . . In my younger and bolder days, I often asked a judge, "Why don't you retire?" . . . [O]ne told me it was rumored that so-and-so would be appointed to his place and he did not intend to permit that

See also *infra* note 55.

49. The examples of Chief Justices Warren and Taft and Justice Douglas, see *supra* notes 40–47 and accompanying text, are not exhaustive. Justice Van Devanter apparently delayed his retirement by several years "because of what he perceived to be a threat against the Constitution." Atkinson, *Retirement and Death on the United States Supreme Court: From Van Devanter to Douglas*, 45 UMKC L. REV. 1, 4 (1976). Chief Justice Stone actually presided in an open session of court a few hours before his death. A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 805–06 (1956). Although he seemingly had been in reasonably good health until he was stricken in open court, his son stated that he (Stone's son) "would be surprised" if his father "had not thought of staying on long enough for a Republican President to be able to appoint his successor." *Id.* at 800 (quoting memorandum from Marshall Stone to Alphens Thomas Mason written in December of 1954).

It was suggested that Chief Justice Burger's surprising decision to retire in the summer of 1986 was prompted in part by a related concern: "In addition to feeling overburdened, sources familiar with the process say, Justice Burger was concerned about the coming Senate elections and the possibility that Republicans could lose their majority. A Democratic-controlled Senate would be far less amenable to confirming conservative Reagan-appointed jurists." Wermiel, *Changes on High Court Are Likely to Increase Conservatives' Clout*, WALL ST. J., June 18, 1986, at 23, col. 1.

50. It is not suggested that many Justices actively seek involvement in the selection of a successor, as Chief Justice

a successor is usually the dominant factor. Presumably most Justices will stay on the Court as long as they personally find the work rewarding, and retire shortly thereafter. It seems unlikely that the identity of the occupant of the White House would frequently be more than a marginal factor.

But it is precisely *at the margin* of the Justice's career that the timing of a retirement decision can be crucial. If a Justice were relatively indifferent between retirement within, say, two years, the intervention of a presidential election could be very important. If a significant political change resulted from the election, the timing of the Justice's retirement could affect the identity—and thus the votes—of one of only nine members of the Court for twenty or more years.

Even if it were conceded that Justices have some power to influence the identity of their successor, the question remains: With a few aberrations aside, is it reasonable to think this factor actually will affect the timing of a retirement decision? In the writer's view, it seems that a Justice's consideration of such a factor is eminently reasonable and therefore quite likely to occur.

The factors which cause Justices, frequently for many years and at advanced age, to continue in perhaps the most demanding job in the legal profession,⁵¹ at salaries not much higher than those of senior associates in major law firms,⁵² are personal and cannot easily be categorized.⁵³ Certainly a major reason for most must be personal satisfaction with the work, largely unaffected by the Court's course of decision after their retirement.

But it also seems likely that many Justices—indeed, surely most—care deeply about the law, the Constitution, the Court, and the Court's future interpretation of the law and Constitution. Surely, for many Justices, it cannot be a matter of indifference that doctrines for which they have worked for years may be overruled or disregarded by the Court after their retirement. Accordingly, given the fact that on many matters even a single vote can be crucial,⁵⁴ the identity of a Justice's potential successor may frequently be of importance to him.⁵⁵

Warren apparently did. A Justice can very easily achieve indirect influence, however, simply by continuing on the bench under a President who has a different view of the Constitution, and retiring when a President of like mind is in office. See *supra* notes 46–47 and accompanying text and *infra* note 55.

51. See generally G. CASPER AND R. POSNER, *THE WORKLOAD OF THE SUPREME COURT* (1976).

52. The salary of the Chief Justice is \$104,700 and that of the Associate Justices is \$100,600. 5 U.S.C.A. § 5332 (West Supp. 1986).

53. The reason, clearly is *not* economic, since Justices may retire at full pay, at age 70 with 10 years' service or at age 65 with 15 years' service. (Between the ages of 65 and 70, the service requirement is reduced one year for each additional year of age.) 28 U.S.C.A. § 371 (West Supp. 1985).

54. See *supra* note 7 and *infra* notes 57–59 and accompanying text.

55. At least one knowledgeable observer regards this political motivation as a significant problem in the federal judiciary. In an address to the Chicago Bar Association on June 21, 1956, the then Senior Judge of the Court of Appeals for the Seventh Circuit stated:

While most judges completely divorce themselves from political activity, there appears to remain in some instances a sense of loyalty to the political party responsible for their appointment, which has been responsible for situations which not only cast serious reflection upon the judiciary but constitute an impediment to the work of the courts. Because of this loyalty a number of judges—some of whom were wholly incapacitated, others partially—refused to retire, even though eligible to do so, because of the hope that at the next election their own party would come into power.

Major, *Federal Judges as Political Patronage*, 38 CHICAGO BAR RECORD, 7, 9 (1956). See also *supra* note 48.

It is frequently asserted that Justice Brennan, Justice Marshall, or both, might retire soon, or would already have retired, if President Reagan were not the man to name their successor.⁵⁶ This may or may not be correct in the case of these two gentlemen. A decision not to retire based on such grounds would be entirely logical, however, if one only makes the assumption that decisions of the Court after their retirement are not a matter of indifference to them. Justices Brennan and Marshall cannot know whom President Reagan would appoint in their stead, or how that person would perform on the Court, but they certainly have had broad areas of disagreement with his other appointees. In the 1985 term, for example, the Court decided (with full opinion) thirty-six cases by 5-4 vote. In those cases, Justice O'Connor voted with Justices Brennan and Marshall four times each.⁵⁷ Justice Rehnquist, who since has been elevated to the Chief Justiceship by President Reagan, sided with Justice Marshall only twice and with Justice Brennan *not a single time* in those thirty-six decisions.⁵⁸ While Justice Scalia has not yet established a record on the Court, it seems unlikely that he will align himself frequently with Justices Brennan and Marshall (who voted together in thirty-four of the thirty-six 5-4 decisions)⁵⁹ in those crucial cases where a single vote may hold the balance. In this writer's view, it seems quite likely that a Justice in the position of Justices Brennan and Marshall would not be indifferent to the future course of decision by the Court; would feel that President Reagan would be more likely to appoint someone whose views approximate those of his earlier appointees than of the Justice considering retirement, but that a future President might be more likely to appoint a Justice with views more compatible with those of the Justice considering retirement; and that therefore, other factors influencing a retirement decision being anywhere near equal, would prefer to defer retirement until after the 1988 election.

The proposed amendment would reduce significantly the power of a Justice to influence the Court's future course of decision by the timing of his retirement. At the outset, it should be noted that this proposal is directed primarily at future Justices, and entirely at retirement decisions to be made under future Presidents. If the proposed amendment had been ratified at the start of the 1986 term, for example, Justice Brennan's retirement would have been required in 1991 and Justice Marshall's in 1995. With the exception of Justice Scalia, no Justice then on the Court would have faced

56. See, e.g., Sitomer, *High Court Closer to Center than Right or Left Would Like*, Christian Science Monitor, Oct. 8, 1985, at 3, 4: "Five of the current nine are well past normal retirement age. Liberal members William Brennan and Thurgood Marshall, among the most senior in age, hint they may leave the court only if and when a Democratic president is elected."

57. *The Supreme Court, 1985 Term*, 100 HARV. L. REV. 1, 307 (1986).

58. *Id.*

59. *Id.*

mandatory retirement before completing at least twenty-four years of service,⁶⁰ a tenure heretofore matched by only nineteen Justices in the history of the Court.⁶¹

Justices, of course, would retain the power to leave the Court whenever they choose,⁶² and, as at present, the President in office at the time of resignation would appoint a successor. The key point is that the successor would be appointed only to fill out his predecessor's term of office. (Justices appointed, pursuant to the proposed amendment, to a full, eighteen-year term will sometimes be referred to as "full-term Justices," and Justices appointed to complete the unfinished terms of predecessor Justices (who may or may not have been full-term Justices) will sometimes be referred to as "successor Justices.") Accordingly, a Justice would have no power to influence the composition of the Court at a point in time after the term to which he was appointed.⁶³ Any timing of a retirement would have a limited impact, and would not deprive the President in office at the end of the eighteen-year term of the power to appoint the full-term successor. This latter feature, which is discussed immediately below, constitutes the most important advantage of the proposal.

C. *Balanced Influence of Presidents on the Court*

In the immediately preceding discussion, it was suggested that for many Justices, a retirement decision may be based in part on a desire to influence, in some measure, the appointment of a successor. The reader may be unpersuaded by the argument presented. As conceded by the writer, this is probably not the dominant factor for many Justices. Obviously, some Justices die suddenly or otherwise leave the Court under circumstances in which it is manifest that hopes of influencing the appointment of a successor played no role.

Let us assume for the moment that random, personally motivated departure is not merely the dominant pattern, but that it is invariable. Assume that Justices only leave the Court for personal reasons, in unpredictable random fashion, after three or thirty-

60. Justice O'Connor would have been forced to retire in 2005, after 24 years of service. If the proposed amendment had been adopted at the start of the Court's 1986 term, the Justices would have been forced to retire as follows:

<i>Justice</i>	<i>Mandatory Retirement on August 1 of</i>	<i>Years on Court by date of Mandatory Retirement</i>
Brennan	1991	35
White	1993	31
Marshall	1995	28
Blackmun	1997	27
Powell	1999	27
Rehnquist	2001	29
Stevens	2003	28
O'Connor	2005	24
Scalia	2007	19

Assuming that a Justice did not complete his term (as seems likely in the case of most present Justices), a successor would be appointed whose term would end on the scheduled ending date of the Justice whom he replaced. See § 4 of the proposed amendment.

61. R. HODDER-WILLIAMS, *supra* note 29, at 183-85.

62. See U.S. CONST. amend. XIII.

63. By contrast, under the present system a Justice appointed for life can time his retirement so that he will be replaced by a younger successor (of similar views) who may reasonably be expected to remain on the Court after the retiring Justice's death.

three years of service. It is submitted that, even under such a set of circumstances, the proposed amendment offers significant advantages over the present system.

The naming of Justices to the Supreme Court is an important political act, and it has an important political effect. Although the federal judiciary is insulated from the political process, its members are determined through that process. Both Republican and Democratic Presidents almost invariably name Justices from their own parties.⁶⁴ When voters select a President, they select the person who, in addition to many other important duties, will name Justices to the Supreme Court. As voters have historically changed the occupants of the White House, they have, indirectly but inexorably, changed the makeup of the Court. But it is (at best) random chance that determines *which* presidential elections will be important in affecting the Court, and which will have little or no effect.⁶⁵ There is no great triumph of logic in a system under which, for example, President Nixon in five and one half years named four Justices,⁶⁶ President Ford in two and one half years named one,⁶⁷ and President Carter in four years named none. Despite being President for only a single term, President Taft named six

64. In the entire history of the country (including the period before the emergence of the Democratic and Republican parties), only 10 Justices were not members of the same political party as the President who appointed them. This number includes Justice Frankfurter, an Independent, who was appointed to the Court by President Franklin Roosevelt. See table originally prepared by M. Spahr, in G. GUNTHER & N. DOWLING, *CONSTITUTIONAL LAW* 1455 (8th ed. 1970). The political affiliation of some Justices is subject to some difference of opinion. Compare the chart prepared by P. Gay, in E. BARRETT & W. COHN, *CONSTITUTIONAL LAW* 1569 (6th ed. 1981). According to the latter tabulation, Justice McLean, who was appointed by Democratic President Jackson, was a Democrat/Republican; Justice Davis, who was appointed by Republican President Lincoln, was a Republican/Democrat; Justice Strong, who was appointed by Republican President Grant, was a Democrat/Republican; and Justice Bradley, who was also appointed by President Grant, was a Whig/Republican. All these Justices were classified by Professor Spahr as belonging to the party of the President who appointed them at the time of appointment. (Professor Spahr lists Justice Davis as "Rep. (later Dem.)").

Surprisingly, before the promotion of Chief Justice Rehnquist, the only Associate Justices ever elevated directly to the Chief Justiceship were not members of the party of the President naming them to the higher position. Chief Justice White, a Democrat, was named to the Court by Democratic President Cleveland and to the Chief Justiceship by Republican President Taft. Chief Justice Stone, a Republican, was named to the Court by Republican President Coolidge and to the Chief Justiceship by Democratic President Franklin Roosevelt. Since Chief Justices White and Stone already were members of the Court, these promotions were not counted in the ten appointments to the Court of Justices not of the President's party.

The political content of appointments is not limited to the Supreme Court. An American Bar Association study of judicial appointments by Presidents beginning with President Cleveland reveals that an overwhelming proportion of judges appointed—from a low of 82.2% for judges appointed by President Taft to a high of 98.7% for those appointed by President Wilson—were members of the President's party. See *Report of the Standing Committee on the Federal Judiciary*, 81 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 439 (1956), as supplemented, reported in SCOTT, *THE SELECTION OF FEDERAL JUDGES: THE INDEPENDENT COMMISSION APPROACH IN JUDICIAL SELECTION AND TENURE* (G. Winters ed., rev. ed. 1973).

This trend has continued to the present. Justices O'Connor and Scalia, the only Justices yet named to the Court by President Reagan, are Republicans, as is Chief Justice Rehnquist. One observer has classified as Republicans 98% of the inferior federal judges named during the President's first term. Friedman and Wermeil, *supra* note 24, at 11, col. 2 (noting study by Professor Sheldon Goldman of the University of Massachusetts at Amherst).

65. For example, as noted earlier, some observers regarded the presidential power to fill vacancies on the Supreme Court as the most important issue of the 1984 election. See *supra* note 25. Whether or not one accepts this analysis, unquestionably it would not be illogical for a voter, on balance, to have preferred Vice President Mondale on other issues, but have preferred President Reagan as the candidate best suited to shape the future of the Court by filling vacancies, or vice versa. What the voter could not know, however, was whether the issue was a real one. The President elected in 1984 might fill six positions on the Court (as did President Taft in four years), or none (as did President Carter in four years), before 1989. The present system, at best, reduces the voter's decision to a gamble.

66. President Nixon named Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist to the Court.

67. President Ford named Justice Stevens to the Court.

Justices,⁶⁸ more than any President in history with the exceptions of Presidents Washington and Franklin Roosevelt.⁶⁹ Even assuming that this occurs on an entirely random basis, the present system makes the composition of the apex of the pyramid of one of the federal government's three coequal branches depend, in large part, on chance. The best that the present system can claim is that this vast power is distributed on a random basis. If we drop this assumption, and assume instead that Justices can and do influence the selection process by the timing of their retirements, the present system becomes even less logical and more difficult to defend.

Under the proposed amendment, each presidential election would carry with it the right to name two full-term Justices. Reelection would double an individual President's influence on the Court, but this seems entirely appropriate, inasmuch as the voters have in every other regard⁷⁰ allowed the individual to exercise presidential powers double those of a one-term President. Some random element would remain, because Presidents would continue to appoint successor Justices to fill vacancies occurring because of death, resignation, or retirement before completion of the full term. However, these appointments would be less important because the successor Justices would serve less time on the Court. It would be difficult to eliminate this degree of random selection⁷⁰ without fundamentally altering the presidential appointment process.⁷¹

It will be observed that the primary benefits of the proposed amendment do not come simply from limiting Justices to specified maximum terms of office. An integral

68. This total includes the promotion of Chief Justice White, who had been appointed Associate Justice by President Cleveland. President Taft's other appointees were Justices Lurton, Hughes, Van Devanter, Lamar, and Pitney.

69. The large number of appointments by Presidents Washington and Franklin Roosevelt is not surprising. Washington had the opportunity of naming *all* the Justices (then six in number) when he assumed the Presidency under the new Constitution, and ultimately named ten Justices (Chief Justices Jay and Ellsworth, and Justices Wilson, Cushing, Blair, Rutledge, Iredell, Johnson, Patterson, and Chase). This total does not include the unconfirmed nomination of John Rutledge as Chief Justice. *See supra* note 27. President Franklin Roosevelt's influence on the Court is to be expected from the fact of his being elected President four times. In slightly over twelve years as President, he promoted Chief Justice Stone and named eight Associate Justices (Justices Black, Reed, Frankfurter, Douglas, Murphy, Byrnes, Jackson, and Rutledge).

70. If one viewed victory in a presidential election as giving the winning *party* the right to name two Justices for 18 years each, then the key feature in naming an appointee to fill an unexpired term would be that he be named by that party. The proposed amendment would uphold this principle only if the President in office at the time the vacancy arose were of the same party as the President who made the full 18-year appointment. However, suppose a Democratic President elected in 1992 appointed a Justice in 1993 who resigned in 2002, creating a vacancy for a term ending 2011. If a Republican were the President in 2002, it would be expected that he would name a Republican Justice to fill out the unexpired term of the Justice appointed to an 18-year term by a Democratic President. Perhaps some system could be devised whereby, to continue the example, Democratic congressional leaders, rather than the President, named the successor Justice (still presumably subject to the Senate's advice and consent). There are several problems with this approach. If it were to be included in a constitutional amendment, this alternative would require that political parties be recognized in the Constitution, although the document is otherwise silent in that regard. The constitutional language also would have to spell out precisely which leaders in the party out of power would exercise this power. A possible solution might be an informal arrangement through which the President would, in such a case, either name the person selected by opposition leaders or, more likely, name someone mutually acceptable to the President and the opposition. However, the situation might not arise with sufficient frequency to keep both sides aware of the reciprocal nature of the informal understanding; moreover, the understanding would be complicated by the parallel practice of the President appointing without consultation full-term Justices (and successors of full-term Justices earlier appointed by a President of the sitting President's own party). Finally, any such process would underscore the basically political nature of appointments to the Court. Although the appointment process is political at its foundation, it is not simply a patronage job nor do its members represent those who appointed them. The Court's legitimacy is enhanced by the degree to which the political side of the appointment process is deemphasized.

71. Some commentators have advanced proposals designed to reduce the political input in Supreme Court appointments. *See, e.g.,* Schrader, *supra* note 26, at 1115. Such proposals are beyond the scope of this Article.

and distinctive feature of the proposal is the fact that if a Justice fails to complete his term, the successor Justice will not receive a full term but will only serve out his predecessor's unexpired term. Without this provision, it would be almost as simple as at present for a Justice to manipulate the appointment process by timing his retirement. Even more important, the power of Presidents (and of the voters) to shape the Court through appointments would continue to be distributed by a method which is, at best, random.

Without the limitation on the terms of successor Justices, a Justice, if he were willing to serve a short time less than the full eighteen years, could leave the Court early in order to have a successor appointed by a like-minded President for an additional eighteen years. (For example, if in 1953 Chief Justice Warren had been appointed to an eighteen-year term scheduled to expire in 1971, he could have timed his resignation for 1968, thereby allowing President Johnson to name a successor who would stay in office until 1986.) Such manipulation would be much less important if the successor's term were to end at the same time as that of the Justice resigning.

Similarly, even if one assumes that Justices leave the Court in a totally random fashion, the benefit of giving each presidential election roughly equal weight in shaping the Court would be frustrated if several Justices chose to retire prematurely during one presidential administration, enabling that President to name successor Justices whose terms would not expire until after the next President or two had left office.

IV. NONPOLITICAL (AND NOT UNMIXED) BENEFITS OF THE PROPOSED AMENDMENT

The primary advantages of the proposed amendment, which have been discussed in the preceding section, are political. In recognition of the political impact of the identity of the members of the Court, the proposal is designed to reduce the ability of Presidents and Justices to skew the appointment process, and to assure that each presidential election is of roughly equal weight in shaping the Court.

Other critics of life tenure have suggested abolition of life tenure, or modifications of the present system within a general system of life tenure. For example, it has been proposed that each Justice be allowed a fixed term from the date of appointment (sometimes with the possibility of reconfirmation),⁷² that a mandatory retirement age be established,⁷³ or that a procedure short of impeachment be implemented to

72. Senator Harry Byrd, Jr., for example, favored amending the Constitution to provide an eight-year term for federal judges. At the end of each eight-year period, they automatically would be considered for a new term by the Senate. See Byrd, *Has Life Tenure Outlived Its Time?*, 59 JUDICATURE 266 (1976). Many other proposals have been put forward in Congress, generally calling for fixed terms or for popular election of federal judges. See generally AMERICAN ENTERPRISE INSTITUTE, JUDICIAL DISCIPLINE AND TENURE PROPOSALS (1979). See also, e.g., I BROOKS, WALTER CLARK: FIGHTING JUDGE 193-96 (1944); I C. WARREN, SUPREME COURT IN UNITED STATES HISTORY 313 (rev. ed. 1947). A classic study of judicial appointment procedures (from which this writer has drawn extensively) and an excellent collection of reform proposals to date of publication is A. VANDERBILT, JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS AND SELECTION (1956) (see especially pp. 21-26).

73. See discussion of this possibility in Fairman, *The Retirement of Federal Judges*, 51 HARV. L. REV. 397 (1938) and in Note, *Analysis of Methods of Judicial Selection and Tenure*, 6 SUFFOLK U.L. REV. 955, 965 (1972). Writing in the aftermath of President Franklin Roosevelt's unsuccessful effort to "pack" the United States Supreme Court, Professor Fairman began his article by noting "the general agreement that it would probably be desirable to bring about earlier

facilitate the removal of Justices rendered incompetent by age or infirmity.⁷⁴ Although the present proposal is directed at obtaining the political benefits previously described, it would still provide, to a degree, some of the "nonpolitical" advantages to be expected from other proposals.

By assuring that Justices would serve no more than eighteen years, the proposed amendment would tend to assure a relatively vigorous Court, and tend to protect the Court from an infirm Justice who refused to retire. The proposed amendment, while tying mandatory retirement to a Justice's term of service on the Court rather than to age, would indirectly offer some of the benefits of a mandatory retirement age. If one accepts the argument that persons above a certain age should be forced to leave the Court, then one should also accept as some benefit the proposed amendment's provision of a mechanism which would force a Justice off the Court by some means other than death or impeachment.

Under the present system, the average age of Justices upon taking up their appointment has been 53.1 years, and 55.4 years for Justices appointed in the twentieth century.⁷⁵ An eighteen-year term would, for an average Justice, provide mandatory retirement in his early seventies, an age similar to that sometimes proposed as suitable for mandatory retirement for Justices.⁷⁶

Obviously, ages of individual Justices vary from the averages, and under the proposed amendment a President would be free to name a person of any age to a full eighteen-year term on the Court. It is reasonable to expect, however, that Presidents would be extremely reluctant to name a person older than some maximum age, let us say age sixty-two,⁷⁷ to a full term on the Court. (As noted earlier,⁷⁸ in the case of the appointment of a successor Justice, a President likely would be willing to name an

retirement through a constitutional amendment." Fairman, 51 HARV. L. REV. at 397. Professor Fairman went on to observe that 10 resolutions directed toward the establishment of a mandatory retirement age, either for the Supreme Court or for the entire federal judiciary, had been introduced in the immediately preceding session of Congress. The 10 proposals would have established mandatory retirement ages ranging from 70 to 80 years, with six proponents choosing age 75. *Id.* at 397 & nn. 1-4.

74. Certain recent proposals in Congress have involved the establishment within the federal judiciary of a procedure for removing judges rendered incompetent by physical or mental infirmity, as well as judges not meeting the constitutional requirement of "good Behavior." See, e.g., S. 1506, 91st Cong., 1st Sess., 115 CONG. REC. 6, 220-24 (1969) (the Judicial Reform Act), discussed in Comment, *The Limitations of Article III on the Proposed Judicial Removal Machinery*: S. 1506, 118 U. PA. L. REV. 1064 (1970); S. 4153, 93rd Cong., 2d Sess., 120 CONG. REC. 36,066-68 (1974), and S. 1110, 94th Cong., 1st Sess. (1975) (both entitled the Judicial Tenure Act), discussed in Nunn, *The Judicial Tenure Act*, 13 TRIAL No. 11, at 26 (1977). Other proposals are discussed in JUDICIAL DISCIPLINE AND TENURE PROPOSALS, *supra* note 72.

It is interesting that Alexander Hamilton stated that "insanity, without any formal or express provision, may be safely pronounced to be virtual disqualification." THE FEDERALIST No. 79, at 514 (A. Hamilton) (Mod. Lib. ed. 1941). See Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L.J. 1475, 1521-25 (1970).

75. R. HODDER-WILLIAMS, *supra* note 29, at 185. The figures in the text do not include Justices O'Connor and Scalia, who were 51 and 50 years of age, respectively, when they were named to the Court.

76. See *supra* note 73 for proposals of mandatory retirement of federal judges at ages 70 through 80. Age 70 is frequently mentioned as an appropriate age for mandatory retirement of state judges. See Winters, *Judicial Retirement and Pension Plans—Eligibility Provisions*, 44 J. AM. JUD. SOC'Y 144, 145 (1960).

77. This was President Eisenhower's tentative maximum age for Justices. See *supra* note 31. Only four Justices in history have been older than 62 when they joined the Court, the oldest being Charles Evans Hughes, who was 67 when named Chief Justice in 1930. (These figures do not include the promotions to the Chief Justiceship of Justices White and Stone, who were 65 and 68 years of age, respectively, at the time of promotion. Although, like Chief Justices White and Stone, Chief Justice Hughes had earlier been an Associate Justice, he was not on the Court when named Chief Justice.) R. HODDER-WILLIAMS, *supra* note 29, at 185.

78. See *supra* text accompanying note 34.

older person to the Court. However, since the President could be expected to take into account the length of the remaining term of office as well as the prospective successor Justice's age, a similar effective mandatory retirement age would result.⁷⁹) Accordingly, the proposed amendment would have an effect approximating that of requiring retirement at an arguably appropriate age, in the case of Justices of average age or older at the time of appointment. On the other hand, in the case of a Justice appointed at an age somewhat younger than the average, the proposed amendment would force the Justice off the Court before it was likely that age would have reduced his powers significantly. Sixteen Justices⁸⁰ (although only three in this century⁸¹) have been appointed to the Court at age forty-five or younger; for such Justices, mandatory retirement on grounds of age alone would not be indicated eighteen years later.

It is clear that the proposed amendment cannot be justified simply as a substitute for the establishment of a mandatory age of retirement. Moreover, the writer would not necessarily endorse a proposal for a mandatory retirement age that did not also provide the political advantages described previously. A mandatory retirement age provision has the effect of forcing the retirement of perfectly competent and effective, if elderly, Justices. As Chief Justice Hughes reminded us: "The community has no more valuable asset than an experienced judge Doubtless there is a time when a judge reaches, on account of age, the limit of effective service, but it is difficult to fix that time."⁸² However, the fact remains that thousands of well-educated and experienced people will be available to fill these nine positions, and it may well be concluded that, on the average, a new Justice aged fifty-eight is preferable to an experienced Justice of seventy-six.

Instead of a mandatory retirement age, some observers focus on the need for a mechanism to force the retirement of a Justice who does not resign despite physical (or mental or emotional) inability to fulfill adequately his duties. It may be supposed that some Justices are simply unwilling to yield power, to retire and become "has-beens."⁸³ Justice Douglas' last year on the Court is an unhappy example of this

79. It would appear that establishment of a mandatory retirement age has much less force in the case of a successor Justice who was to serve only a short period of time. This is because short-range predictions of an individual's future health and energy are more reliable than are predictions concerning the distant future. Even if we were, in general, concerned about Justices over age 75, for example, it is obvious that many persons of that age can function quite well. If a President needed to appoint a successor Justice for a two-year term, he might feel reasonably confident in appointing a healthy, vigorous person aged 77. The President might view this appointment as less risky, in terms of health problems interfering with the proposed Justice's performance before the end of his term, than the appointment of a healthy 61-year-old person to a full 18-year term. Although retirement in both cases would be mandatory at age 79, in the first case it is already known that the proposed member of the Court is in good condition at age 77; in the second, that is a matter of speculation.

80. R. HODDER-WILLIAMS, *supra* note 29, at 183-85.

81. Justices Douglas, Stewart, and White were, respectively, aged 40, 43, and 44 when they joined the Court. *Id.* at 185.

82. C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES 74-75* (1928).

83. See Major, *supra* note 48. One of the reasons for not retiring given to Judge Major by one unidentified judge was that "he enjoyed the prestige of being a judge." *Id.* at 30.

Obviously, the assertion can be made that elected officials no less than Justices may wish to retain power despite personal capacity diminished by age. Unlike the life-tenured Justice, however, the elected official needs to persuade not only himself that he is capable of doing his job effectively, but to persuade the electorate as well. For two examples of the age issue in electoral politics, one need look no further than the presidential elections of 1980 and 1984. See, e.g., P. Goldman, *The Making of a Landslide: The Rise and Fall of the Age Issue*, *NEWSWEEK*, Nov.-Dec. 1984 (Election Extra Ed.), at 103.

situation⁸⁴ (which was exacerbated by his reluctance to leave the Court while President Ford was in office).⁸⁵ It is difficult to construe such incapacity as a failure of "good Behavior,"⁸⁶ which seemingly is the only constitutional limit on life tenure.⁸⁷ Moreover, removal by impeachment and trial seems cruel and inappropriate in the case of a Justice whose only "crime" is to remain on the bench while senile or sick. Several proposals call for some sort of medical inquiry, frequently under the supervision of other judges.⁸⁸

The writer is in sympathy with those who seek a systematic method of forcing the retirement of infirm judges. The proposed amendment, which is directed to other problems, makes a modest, indirect contribution in such a situation. The proposed amendment would constitute an improvement regarding infirm Justices simply because forced retirement at the end of a stated term of office, rather than at death, would cause the situation to arise less often. If a Justice became infirm within his term of office, the proposed amendment would be little better than the present system in forcing the Justice off the bench.⁸⁹ It should be noted that the contribution of the proposed amendment to the solution of this problem would result automatically, without a subjective and demeaning determination of incompetency.

The problem of infirmity is probably less on the Supreme Court than in the inferior federal judiciary. Public scrutiny is greater, and in at least one recent instance, the Court displayed an institutional willingness to take extreme measures to force the retirement of an infirm Justice.⁹⁰ In any event, there is nothing in the proposed amendment which would prevent adoption of a separate proposal designed to facilitate the removal of an infirm Justice or inferior federal judge.⁹¹

84. A detailed description of Justice Douglas' last months on the Court is found in J. SIMON, *INDEPENDENT JOURNEY* 446-54 (1980). Justice Douglas suffered a stroke in December, 1974, but for nearly a year refused to resign although it was apparent to other members of the Court and to many outsiders that he could no longer function effectively as a Justice. Even after he finally resigned in November, 1975, and Justice Stevens had joined the Court, "Douglas insisted that he was still a member, the *tenth* member, of the U.S. Supreme Court," and he sought to remain a voting member of the Court in some cases. *Id.* at 452-53 (emphasis in original).

85. See *supra* text accompanying note 46.

86. U.S. CONST. art. III, § 1.

A federal district court judge, John Pickering, was removed from office in 1804 by impeachment. He "had been an insane drunkard for some time," but was not guilty of "Treason, Bribery, or other High Crimes and Misdemeanors" as those terms are normally used. See Turner, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485, 487 (1949).

87. Proposals for the forced removal of infirm judges do not assume the necessity of a constitutional amendment. See proposals cited *supra* at note 74.

88. See *supra* note 74.

89. Under the proposed amendment, the potential duration of the problem would be limited to the Justice's term of office, rather than to his life span. Most would agree, however, that having an essentially nonfunctioning Justice for a period of several years—which would still be possible under the proposed amendment—would be intolerable.

90. Following a stroke in 1974, Justice Douglas could not function effectively. See *supra* note 84. As Douglas' condition worsened, the other members of the Court agreed informally to a strategy that would effectively nullify his vote. If the other members of the Court were split four-four, the case would be held over for reargument the next term. The Justices also agreed not to grant certiorari unless there were four votes, excluding Douglas', for review. J. SIMON, *supra* note 84, at 449. Assuming this account is correct, it shows a high resolve on the part of the Court, and particularly of the Court's more liberal Justices (whose positions probably would have prevailed with Justice Douglas' vote), to place pressure on Justice Douglas to retire.

91. It is the writer's personal belief that abolition of life tenure would have a salutary effect on a Justice's attitude toward the Court. Instead of viewing his appointment as creating a fiefdom of which he owned an undivided one-ninth interest, a Justice would be made more cognizant of the fact that the Court belongs not to its Justices but to the Republic. Obviously, another observer might conclude that life tenure had a salutary psychological effect on Justices. Life tenure

The writer does not suggest that the proposed amendment is the best vehicle to obtain the benefits of a mandatory retirement age or of a mechanism for removing infirm Justices, but only that some portion of the benefits sought by proponents of those proposals should result. The primary benefits sought from the proposed amendment are the political benefits discussed in the preceding section.

In this writer's view, the only question regarding the wisdom of the proposed amendment lies not with the substance of the benefits which it would bring, but with whether those benefits can be obtained without undermining the independence of the Court.

V. INDEPENDENCE OF THE COURT

As noted earlier,⁹² the purpose of life tenure is to protect the independence of the Court from the political branches of government. The primary purpose of this section of the Article is to consider the degree to which the proposed amendment would impinge on the Court's independence. It will be remembered that the primary purpose of offering the proposed amendment is to secure the political benefits previously described. The proposed amendment represents an effort to achieve those benefits with the least disruption possible of the present system. This means that the proposed amendment has been designed to protect the Court's independence to the degree possible. The question of the desirable degree of independence of the Court would be the subject of another article, and is discussed briefly only for the purpose of arguing that the proposal should not be rejected out of hand.

A. *How Much Independence Is Desired?*

A proposal should not automatically be rejected because it involves any degree of reduction in the Court's independence. Indeed, a plausible case can be made for greatly increasing political influences on the Court. Thomas Jefferson, who did not find his way into our history books through advocacy of tyranny, "was bitterly critical of the lifetime federal judiciary."⁹³

The federal judiciary's independence could be viewed as out of place in a democracy. Should the Court's enormous powers be wielded by judges totally immune from the electorate, or should the influence of officials whose legitimacy derives from the ballot box—officials who, like Supreme Court Justices, are sworn to uphold the Constitution⁹⁴—be expanded?

may increase a Justice's sense of loyalty to the institution of the Court, for example, and this may be viewed as a significant benefit.

92. See *supra* notes 37–38 and accompanying text.

93. A. VANDERBILT, *supra* note 72, at 22 n. 75. Chief Justice (of the New Jersey Supreme Court) Vanderbilt makes the observation quoted in the text in the course of noting that in 1776, Jefferson agreed that judges should enjoy life tenure, but later changed his mind. As President, Jefferson described impeachment, the only check on life tenure, as "a scarecrow." W. MURPHY AND C. PRITCHETT, *COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS* 552 (1961).

94. To use again President Jefferson's words: "You seem to consider the judges as the ultimate arbiters of all constitutional questions. . . . The constitution has erected no such single tribunal When the legislative or executive functionaries act unconstitutionally, they are responsible to the people in their elective capacity." Letter to Wm. C. Jarvis (Sept. 28, 1820), *reprinted in* X *THE WRITINGS OF THOMAS JEFFERSON* 160 (Ford ed. 1899).

The judicial systems of the states present an interesting comparison to that of the federal judiciary. As Chief Justice Vanderbilt recounts, at the time of the Revolutionary War one of the principal complaints against the King was that colonial judges, who held office at the pleasure of the Crown, lacked independence.⁹⁵ As an outgrowth of the Revolution, not only the federal judiciary but that of most states enjoyed life tenure,⁹⁶ as did the judges of most states admitted before 1830.⁹⁷ Later in the nineteenth century, the system of life tenure was seriously challenged as undemocratic, and ultimately almost all states abolished life tenure.⁹⁸

In the federal government, the constitutional scheme of power, insulated from the people, has been greatly eroded in the case of both the executive and legislative branches of government. Representatives were always directly elected, but under the original Constitution, Senators, who were viewed as representatives of the states rather than of the people, were chosen by the legislatures.⁹⁹ Direct election of Senators has been required since the adoption of the Seventeenth Amendment in 1913.¹⁰⁰ Similarly, without amendment of the Constitution, the system of election of the President has changed from the indirect system envisioned by the framers of the Constitution to one in which the electoral college remains as a quaint method of counting the votes of the people.¹⁰¹

In the federal judicial scheme, a number of courts exist with judges not protected by life tenure. Judges of the Tax Court and the Claims Court, for example, do not enjoy life tenure,¹⁰² but seemingly operate with something less than subservience toward the government.

It is submitted that a balance between democracy and insulation of judges from political influence must be struck. Few critics of life tenure would go so far as to revert to the pre-1776 situation in which judges served at the pleasure of the executive. On the other hand, the most ardent defenders of the Court's present independence recognize that its independence at some point is limited by the ultimate, though indirect, power of the people. As discussed earlier,¹⁰³ the system of appointment of Justices provides an important political control on the Court. If maximum insulation of the Court from the political branches of government were the only value to be considered, it could be further insured by changing the system of appointment. For example, instead of allowing the President (and Senate)—crass politicians—to fill vacancies on the Court, the remaining Justices could select the new Justice. Few would carry the antidemocratic insulation of the Court to that degree.

95. A. VANDERBILT, *supra* note 72, at 21.

96. Eight of the original 13 states gave their judges life tenure. *Id.*

97. Eight of the 11 states admitted before 1830 gave their judges life tenure. *Id.*

98. Chief Justice Vanderbilt stated that all states except Massachusetts and New Hampshire abolished life tenure. *Id.* at 23–24.

99. U.S. CONST. art. I, § 3, cl. 1.

100. U.S. CONST. amend. XVII.

101. U.S. CONST. art. II, § 1.

102. The term of office of judges of both the Tax Court and the Claims Court is 15 years. 26 U.S.C.A. § 7443(e); 28 U.S.C.A. § 172(a) (West Supp. 1985).

103. See *supra* notes 64–69 and accompanying text.

It is beyond the scope of this Article to address at length the desirability, for its own sake, of subjecting the United States Supreme Court to increased control by the same political forces at work in the other branches of government. The foregoing discussion is designed to remind the reader that some political forces are already at work in controlling the Court, and that even greatly increased political responsiveness by the Court would not necessarily be harmful. Accordingly, even defenders of the Court's independence may conclude that obtaining the significant benefits of the proposed amendment—which primarily consist of systematizing the political influence on the Court which is already present—would justify a slight decrease in the independence of the Court.

B. Effects of the Proposed Amendment on the Independence of the Court

It is the writer's view that the proposed amendment would not significantly reduce the Supreme Court's independence from the political branches of government. Nevertheless, it must be conceded that the proposal would marginally increase the influence of the political branches on the Court. An expected increase in their influence can be identified in at least three areas, which are discussed in order of ascending importance.

First, it is possible that the decisions and opinions of a full-term Justice would be affected by his interest in maintaining political, business, or social credentials. This is a minor concern, at least when put in the context of comparison to the present system. Such values may affect the votes of any Justice, even one who enjoys life tenure.¹⁰⁴ If the proposal would bring about a deleterious effect in this regard, it would be because Justices would alter their votes in order to smooth their way into post-Court professional or political careers.¹⁰⁵ It seems likely that the effect would be minor until late in the Justice's term, and this should provide considerable independence throughout most of the term. The supposed effect on the post-Court career would be nil in the case of most Justices, since it would affect only a Justice who in fact expected to enter a new career. (The proposed amendment precludes reappointment to the Court, thereby avoiding the most obvious threat of lessened independence.) Given the age of most Justices when they enter the Court,¹⁰⁶ and the fact that this proposal might be expected to cause Presidents to name even older Justices,¹⁰⁷ it is unlikely that many Justices will have future professional or political ambitions after completing eighteen years on the Court. Again, it must be remembered that the proposal must be weighed against not some idealized system of philosopher kings but against the present system. A certain number of Justices, no doubt, may view the Court as a temporary post in a career. Examples include Justice Goldberg, who served on the Court between stints as Secretary of Labor and

104. See Miller and Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

105. Even a retired Justice without future plans for work would be interested in his social and family ties, and this might affect his votes while on the Court. It seems likely, however, that the best way to maintain such personal ties might be to follow a position of personal integrity. More important, it would seem that a Justice swayed by such personal considerations probably would be affected even if he enjoyed life tenure.

106. See *supra* notes 75–77 and accompanying text.

107. See *supra* notes 23–36 and accompanying text.

Ambassador to the United Nations,¹⁰⁸ and Justice Byrnes, who left the Court after a short period to assist President Roosevelt during World War II.¹⁰⁹ It is submitted that relatively few Justices of such a bent will serve eighteen years on the Court. The proposed amendment will have no effect whatever on full-term Justices who elect to resign within eighteen years.

Second, even if it were assumed that the forced retirement mandated by the proposed amendment would have no effect whatever on any Justice while he is sitting, the proposal would increase the influence of the political branches of government on the Court. This would result because a Justice forced to retire after his term would be replaced by a newly appointed and confirmed Justice. Thus, to the degree that the political process of nomination and confirmation influences the Court by producing a Justice compatible with the then-prevailing political views,¹¹⁰ it is the more modern view, and not that of eighteen years earlier, which produces the Justice in question. It is less likely that a Justice will be inclined to act independently of the current political forces when his appointment was produced by those forces. In evaluating the proposed amendment, however, it is easy to overstate the importance of this increased influence of the political branches. Most Justices stay on the Court for less than eighteen years anyway,¹¹¹ so most would not be affected by the change. Moreover, the influence is achieved by an orderly change of personnel, and not from forcing any Justice, while sitting, to decide a case other than as he thinks proper. Finally, the newly appointed Justice would not automatically mirror current philosophies more clearly than would the outgoing Justice reflect those of eighteen years previously.

The area of greatest concern¹¹² involves not full-term Justices—whether or not

108. Justice Goldberg apparently left the Court with reluctance, out of political loyalty to President Johnson. See H. ABRAHAM, *supra* note 27, at 261–62.

109. Justice Byrnes recounted the events leading up to his resignation from the Court in J. BYRNES, *SPEAKING FRANKLY* 12–18 (1947).

110. The success of Presidents in appointing Justices who will mirror the presidential view of the Constitution is by no means complete. For example, the three most liberal members of the present Court would appear to be Justices Marshall, Brennan, and Stevens. The latter two were appointed, respectively, by Presidents Eisenhower and Ford, moderate-to-conservative Republicans. (Some commentators place in the most liberal grouping Justice Blackmun, who was appointed by President Nixon; this serves only to underscore the point just made.) Cf. note 23 *supra* for President Eisenhower's characterization of his appointment of Chief Justice Warren. President Truman observed: "[P]lacing the Supreme Court simply can't be done . . . I've tried and it won't work . . . Whenever you put a man on the Supreme Court he ceases to be your friend." Lecture at Columbia University, New York (Apr. 28, 1959), *quoted in* H. ABRAHAM, *supra* note 27, at 63.

111. See *supra* note 36. Thirty-one Justices exclusive of present members of the Court, served for more than 18 years. This is a significant minority of all former Justices, who total 94. R. HODDER-WILLIAMS, *supra* note 29, at 183–85.

112. Some will conclude that the primary concern is increased politicization of the Court, or the perception of such politicization, undermining the Court as an institution. Professor M. Eugene Mullins, the author's colleague at the University of Arkansas at Little Rock School of Law, commented on a draft of this Article. Professor Mullins' comments include the following observations (which are printed here with his permission):

The . . . drift toward further politicizing the Court as an institution seems neglected [in the Article]. The impacts on the independence of the "Court" are discussed largely in terms of the impact on the independence of the individual Justices . . . The political responsiveness of the Supreme Court, the potential for change in the institutional behavior of the Supreme Court, and the Court's independence as an *institution*, all seem to be neglected. The analysis in the [A]rticle at present is systematic and methodical, but may pay insufficient attention to the dynamics of the forces which such an amendment could set into motion and the potential for disruption of the constitutional equilibrium which could result. The psychology of the matter, public perception, the potential for transforming the Court into an even more overtly politicized institution, the consequences of

they serve their full terms—but successor Justices. While it reasonably can be supposed that a Justice looking forward to eighteen years on the Court would not approach his task in a manner greatly different from that of a Justice enjoying life tenure, that supposition becomes weaker with a shorter term. In the extreme case, it is not unlikely that a Justice appointed for only a year or two might wish to retain close connections with members of the political branches of government. While short-term appointments might be used, quite appropriately in the writer's view, as final positions for distinguished federal judges (and others) near retirement, a President might think he could exert leverage over a Justice who, after leaving the Court, would be interested in future positions. The most direct type of influence, that of a Justice tailoring his actions on the Court in order that he might be named to a full term, is impossible under the proposed amendment, which bars reappointment to the Court. The proposed amendment has been carefully tailored to minimize another clear danger which might arise if a Justice were to leave the Court during the term of office of the President who appointed him. Suppose a successor Justice were appointed to finish out one or two years of a nearly completed term, and the term were to end while the same President were in office. If the President named a Justice interested in another presidential appointment after leaving the Court, the Justice might feel pressured to tailor his actions to suit the President. In such a situation, however, the term of office of the Justice so appointed will not expire, but will extend eighteen years beyond its ordinary expiration date.¹¹³ Therefore, no Justice will ever

a biennial Senate confirmation process (which could erode the status of the Supreme Court into a kind of "super-agency"), all seem to be given insufficient attention. The independence of the Court simply is not congruent with the independence of the individual Justices.

M. Eugene Mullins, unpublished memorandum dated Nov. 13, 1985, in the possession of the author (emphasis in original).

With great deference to Professor Mullins, the author rejects the above analysis. First, it would require us to concentrate on those aspects of the proposal (and of the present system of life tenure) that are speculative and conjectural, rather than those which can be demonstrated in a reasonably objective way. While not oblivious to the potentially adverse effect of a heightened perception of the Court's politicization (*see supra* note 70), the writer's personal conjecture is that the institutional effect of the proposal, while minor, to the degree present would be quite wholesome. *See supra* note 91.

More important, it simply is too late to put the clothes back on the emperor and pretend that the Court is not already an intensely political body making fundamental policy choices. The Court's pronouncements are not merely pored over by lawyers and scholars, but are a staple of network news programs. The word has slipped out, to the public as well as to the political branches, that the Court does far more than make objective determinations of law. Indeed, it might be asserted that in the popular view federal judges are perceived as much more frequently making fundamental policy choices than are state judges who lack life tenure.

Finally, the suggestion that a slight increase in the frequency of Senate confirmation proceedings somehow reduces the stature of the Court or makes it appear more political than at present strikes the writer as entirely without foundation. The proposal would substitute an orderly succession, with confirmation proceedings more than a year before the next election, for one in which Presidents try to push through nominations in the waning months of their terms, and Senators oppose those nominations either in the hope that a new President will fill the vacancy with a different Justice or simply to make political points for an upcoming senatorial election. Politics already has found its way to the nomination and confirmation process, and has done so in a very public manner. Would anyone seriously argue, for example, that Chief Justice Rehnquist was either selected by President Reagan or opposed by certain Senators primarily because of such neutral factors as intellect, legal ability, or honesty?

The proposal will not bring us to nirvana. However, it does offer an improvement on the far-from-perfect present system by systematizing influences that we might prefer did not exist.

113. Suppose a Justice whose term of office was to expire in 1995 resigned in 1993. The successor Justice would be named by the President elected in 1992. Under the general rule of the proposed amendment, the successor Justice would leave the Court in 1995, and might seek another appointment from the same President who had named him to the Court. Under the special rule (*see* § 5 of the proposed amendment), the term of the Justice would end 18 years after the normal date, or in 2013.

be in the position of being placed on the Court by a President who certainly¹¹⁴ will be in office when the Justice leaves the Court.¹¹⁵

If the possibility of a successor or full-term Justice being unduly influenced is still viewed as unacceptably high, the proposal could be tailored in a number of ways to reduce such influence, and perhaps entirely eliminate it. Alternatives are discussed below.¹¹⁶

In summary, the proposed amendment would entail some degree of increased influence over the Court by the political branches of government. This may be viewed as a benefit or a drawback of the proposal. The proposal, however, is designed to address other problems and provide other benefits, and thus is designed to minimize such influences as a distraction from the primary points. Assuming that increased influence by the political branches is viewed as detrimental, it seems probable that such influence would be minimal on a Justice appointed for a full term (or a substantial partial term), and, if influence on Justices serving short partial terms is viewed as a serious problem, the proposal can be modified to reduce or eliminate any such influence. In any event, it is submitted that any disadvantage of slightly reduced independence of the Court would be greatly outweighed by the benefits of replacing life tenure with a system of staggered, fixed, eighteen-year terms.

VI. POSSIBLE MODIFICATIONS OF THE PROPOSED AMENDMENT

In order to achieve the “political benefits” discussed previously, it is essential that the proposed amendment provide for a system of fixed, staggered terms, and provide that the terms of successor Justices be limited to completion of the terms of the Justices whom they replace. In the writer’s view, the case for making the changes proposed in order to obtain these benefits is clear. In general, where the benefit of a change was not absolutely clear (to the writer), the proposed amendment was structured so as to proffer the smallest change in present procedures necessary to secure these political benefits. The most important example of this approach is the fact that the proposal was designed to retain the independence of the Court to the greatest degree possible. This decision was based not on the conviction that the present degree of independence best serves the national interest, but simply on the pragmatic grounds that the net benefit of reducing the Court’s independence could not

It will be observed that this approach does not undermine the political benefits of the proposal by allowing the President an additional appointment of a full-term Justice. There would be no vacancy to be filled at the usual time (1995, in the example from the preceding paragraph). In effect, the President would have made one of his full-term appointments earlier in his term than usual.

114. The possibility of the President’s death (or resignation) means that there never is certainty that the President will be in office at a future time. If, under the circumstances described *supra* in note 113 and accompanying text, the President died in the interval between appointment and the usual expiration date of the successor Justice’s term on the Court, the successor Justice’s term would nevertheless be extended 18 years. This would have the effect of depriving the elected Vice-President of an appointment to which he otherwise would have been entitled. Far from undermining the political benefits of the proposed amendment, however, this seems entirely appropriate. The electorate would have chosen the President, not the Vice-President, as the preferred person to name Supreme Court Justices.

115. The possibility still exists that the successor Justice might be appointed to finish a term scheduled to expire in the next presidential term, and due to the President’s reelection, might leave the Court while the President who appointed him was still in office. This problem is discussed *infra* at notes 136–38 and accompanying text.

116. See *infra* notes 150–61 and accompanying text.

clearly and easily be demonstrated. Debate of the merits of the Court's independence necessarily would require subjective argumentation that might reasonably be rejected by many, and would detract from consideration of the clearer, more objective political benefits toward which the proposal is directed.

In order to frame a concrete proposal, however, it was necessary to include in the proposed amendment language embracing certain policy choices, not all of which are essential. The purpose of this section of the Article is to explain the reasons for the choices made, and to set forth alternative formulations with respect to certain tangential matters.

A. *Establishment of Eighteen-Year Terms and Failure to Establish A Nine-Member Court*

In itself, there is no magic in the eighteen-year term. The term should be long enough to secure a Justice's substantial insulation from the political process, but ideally, short enough so that a large proportion of the Justices would serve the full term.¹¹⁷ Eighteen years seems a reasonable length for these purposes.¹¹⁸

While approximately eighteen years seems a reasonable term, the bases for the selection of that precise figure are, obviously, the facts that there are nine Justices on the Court and that presidential elections are held every four years. An eighteen-year term results in one vacancy every two years, and thus empowers each President to name exactly two full-term Justices (in addition to successor Justices). If the Court had eight or ten members, for example, sixteen or twenty years would be a more reasonable term.

It should be noted that neither the Constitution nor the proposed amendment fixes the size of the Court at nine members. Although it has had nine members since 1866, historically the size of the Court has fluctuated from six to ten.¹¹⁹ Congress might again elect to expand or decrease the size of the Court. Such a change would tend to frustrate the intent of the proposed amendment in two ways. First, depending

117. The advantage of most Justices serving the full term is that this would tend to equalize the power of Presidents in shaping the Court. If their term of office were, for example, thirty years, most Justices appointed for full terms would leave the Court long before their terms expired. To some degree, this would frustrate all the political benefits sought. Presidents might appoint younger Justices, in order that their appointees might serve a greater proportion of the term. Justices might time their retirements in order that a President of like mind could appoint a successor Justice who would serve many years. Most important, the equal power of Presidents to shape the Court would be materially distorted if a significant proportion of the Court were to be made up of successor Justices, since a President's right to name these Justices would continue to depend on a process which is, at best, random.

118. With respect to the effect of an 18-year term on a Justice's independence, *see supra* notes 104-09 and accompanying text.

In the past, Justices have served an average of approximately 15 years. *See supra* note 36. This is a large fraction of 18 years, and suggests that at any given time the Court would have few successor Justices. Moreover, some Justices might be inclined to stay on the Court for two or three additional years, if that would enable them to complete their term, when they might retire earlier if there were no specified time for retirement.

119. When President Washington appointed the first Justices, the Court consisted of the Chief Justice and five Associate Justices. I C. WARREN, *supra* note 11, at 36. Congress created one additional Associate Justice position in 1807, occasioned in part by increased business for the Court in Kentucky, Tennessee, and Ohio. *Id.* at 299. In 1837, Congress established two new Circuits in the West and Southwest, and added two new Associate Justice positions. *Id.* vol. II, at 313. During the War Between the States, Congress created a new Circuit comprising California and Oregon, and authorized a tenth seat on the Court. *Id.* vol. III, at 102. Finally, for reasons discussed *infra* at note 121, Congress in 1866 reduced the Court to its present size. *Id.* at 145.

upon whether the Court were expanded or decreased in size, the power of the President then in office to make the appointments anticipated under the proposal would be expanded or decreased.¹²⁰ It is all but certain that such a change would be based on political considerations,¹²¹ unless the Court were fundamentally restructured.¹²² Second, if the number of Justices comprising the Court were changed, the eighteen-year term would mean that in the future each President would no longer be allowed exactly two appointments of full-term Justices.¹²³

The proposed amendment could be changed to begin: "The Supreme Court shall consist of the Chief Justice of the United States and eight Associate Justices." In line with the general approach, however, the writer's preference is not to change the present system unless essential. It seems unlikely that Congress will change the size of the Court for transient political purposes. The Court's size has been constant for nearly 120 years, despite many occasions in which the same party controlled the White House and both houses of Congress. In the strongest challenge, a heavily Democratic Congress resisted the efforts of a popular Democratic President, Franklin Roosevelt, to "pack the Court."¹²⁴

Because it seems unlikely that Congress will change the size of the Court, it might appear that specifying a nine-Justice Court in the Constitution would only formalize, and not change, the present situation. However, the status quo would be changed in one potentially significant way. As a balance to the Court's power to have the last word in constitutional interpretation, Congress (with the cooperation of the President) has an ultimate political check. If the Court's interpretation is so out of line with the popular will (as reflected in the political branches of government) as to undermine the Court's legitimacy, Congress has the constitutional power to create as many new positions on the Court as necessary in order to obtain a more acceptable interpretation. Indeed, some would argue that the *threat* of President Roosevelt's Court-packing plan had the desired effect, by bringing about the so-called "switch in time that saved nine."¹²⁵ A clearer example of this situation arose from a British

120. If the Court were decreased in size, this might mean that the Congress wished to prevent the President then in office from filling a vacancy. *See, e.g.*, the discussion in note 121 *infra* of congressional action during President Andrew Johnson's administration. Such a schism between the President and Congress might indicate that the President would have had a difficult time in obtaining Senate confirmation for any appointee.

121. The only reduction in the Court's size was blatantly political. Following Justice Catron's death in 1865, President Andrew Johnson nominated Henry Stanberry of Ohio. "The Senate however, was determined to curb the President in every move," and Congress responded to the nomination by reducing the size of the Court. When asked whether the bill would have the effect of nullifying the Stanberry appointment, "it was stated by Wilson of Iowa that such was its effect as well as purpose." III C. WARREN, *supra* note 11, at 144-45.

122. If, for example, the Court began hearing cases in panels, a different number of Justices might be thought appropriate. Earlier increases in the size of the Court were viewed as responses to perceived needs for additional Circuit Justices, and conceivably this perception could again lead to an expansion of the Court's size. *See supra* note 119.

123. If, for example, the Court were expanded to ten members, in each 18-year period ten positions, rather than nine, would become vacant. Every 18 years after the expansion, the President then in office would be able to appoint three, rather than two, full-term Justices. Similarly, reduction of the Court to eight members would deprive Presidents of an appointment in years in which the abolished seat would have become vacant.

124. *See, e.g.*, J. ALSOP & T. CATLEDGE, *THE 168 DAYS* (1938).

125. Chief Justice Hughes and, more notably, Justice Roberts did not follow their usual conservative positions and voted with Justices Brandeis, Cardozo, and Stone to sustain New Deal legislation. The opinions in these cases were announced while Congress was considering President Roosevelt's proposed "Court-packing" legislation, and may have been a political response to the proposal. *Id.* at 135-47. It is interesting that while Messrs. Alsop and Catledge attribute

constitutional crisis in 1911. The House of Commons insisted that the House of Lords agree to a bill that would end the Lords' power to block legislation. When the Lords refused to agree, the Prime Minister persuaded King George V to threaten to create a sufficient number of new lordships, and name new lords committed to the bill, to change the vote. In the face of this threat, the Lords capitulated.¹²⁶

B. *Beginning Date of Justices' Terms*

The proposal calls for terms to begin on August 1 of odd-numbered years. Although, in theory, the benefits of the proposal would be realized regardless of the starting date, there are practical reasons for putting the starting date in the summer of odd-numbered years.

The change of personnel should be less disruptive to the Court if it occurs during the Court's summer recess, which normally includes August 1. The new Justice would have several weeks on the job before the new term's commencement in October.

For very different reasons, it is important that the new terms start in odd-numbered years. If the term of one Justice is to expire every two years, the proposed amendment could set the timing of full-term nominations and confirmations to fall either always in election years or always in non-election years. The party out of power (particularly if it controlled the Senate) might be tempted to delay the confirmation of the President's second full-term nominee if the confirmation were to be held in the summer of a presidential election year. The attraction of delaying confirmation would be that if the party out of power regained the White House in the November elections, the new Justice then would be named by the new President. In fact, historically the Senate has failed to confirm a disproportionately high number of appointments to the Court made in presidential election years.¹²⁷ If a President's nominee were blocked for this reason, the most important political benefit of the proposed amendment, that of securing to each presidential election a relatively equal control over the makeup of the Court, would be undermined. Moreover, the political

the "switch" to political pressure reflected in the 1936 election results, they conclude that the switch actually occurred in a vote in chambers before the President's plan was announced. *Id.* at 138-40.

126. N. WILSON, *THE BRITISH SYSTEM OF GOVERNMENT* 184-86 (1963). The House of Commons and the Crown had earlier used this device to secure the House of Lords' approval of the Treaty of Utrecht in 1712 and the Reform Bill in 1832. W. JENNINGS, *THE BRITISH CONSTITUTION* 104 (5th ed., 2d printing 1968).

Proposals for packing the United States Supreme Court have not been limited to the crisis of the Great Depression. When the Supreme Court threatened congressional plans for Reconstruction in the South following the War Between the States, *Harper's Weekly* editorialized:

If the Supreme Court undertakes to declare that the people of the United States, at the end of a long and fearful war in which they saved the Government, can do nothing to secure that Government from similar assaults hereafter, let the Supreme Court be swamped by a thorough reorganization and increased number of Judges The remodeling of the Court may truly be called an extreme measure, to be adopted only in most extraordinary cases, as that which would arise if the five Judges should deliberately undertake to nullify the will of the majority of the people of the United States in reorganizing the Union.

HARPER'S WEEKLY, Jan. 19, Feb. 9, Mar. 2, 1867, quoted in III C. WARREN, *supra* note 11, at 169.

127. Professor White observed that President Johnson's 1968 nominations of Justice Fortas to be Chief Justice and Judge Thornberry to replace Fortas were threatened by the President's "'lame-duck' status: Only seven out of sixteen Supreme Court nominations made by presidents in the last year of their tenure had been confirmed by the Senate." G. WHITE, *supra* note 40, at 308.

nature of the selection process would be emphasized, and this might tend to reduce the Court's legitimacy.

C. Transition to the New System

Adoption of the proposed amendment might force the retirement of Justices originally appointed for life tenure. The most senior Justice would be forced to retire five or six years after ratification,¹²⁸ and another Justice every two years thereafter. Because the retirements would be forced by the explicit terms of a constitutional amendment, there could be no legal objection.¹²⁹ Nevertheless, it might appear that the purpose of the proposed amendment is to force certain current Justices off the Court for partisan purposes.

The proposed amendment could be altered to provide a transition rule which would assure life tenure to every Justice on the Court at the time of ratification.¹³⁰ Alternatively, the process of forced retirement could be pushed several more years into the future, making it less likely that any Justice on the Court at the date of ratification would be forced to retire.¹³¹

Either of these changes would leave the essence of the proposal intact. The only objection is that the benefits of the proposed amendment would be delayed. Moreover, there is no justification for the delay. Neither the fact nor the appearance of a nonpartisan, systematic changeover is compromised by the transition period provided in the proposed amendment. Even the most senior Justice will be allowed a minimum of approximately five years¹³² before forced retirement, a period which assures the intervention of at least one distant presidential election.¹³³ This means that

128. The most senior Justice would be required to leave the Court on August 1 of the third odd-numbered year following the proposed amendment's effective date. *See* § 2 of the proposed amendment. If the proposed amendment took effect late in an even-numbered year, the most senior Justice would be forced to retire four years from the following summer, a period of slightly less than five years. On the other hand, if the proposal took effect early in an odd-numbered year, that Justice would have some 6-1/2 years until forced retirement.

129. The Constitution is the supreme domestic law of the United States. The only legal objection to a duly ratified constitutional provision is that it violates fundamental human rights or otherwise conflicts with international law. For example, a constitutional amendment directing the President to supervise the armed forces in extermination of a racial group probably would be illegal. *See, e.g.,* Articles 6(c) and 8 of the Charter of the International Military Tribunal pursuant to which the post-World War II Nuremberg Trials were held. The interest of a Justice in life tenure obviously does not rise to the level of an internationally protected right.

130. This could be done without great complication. For example, the terms of the Justices on the Court at the time of ratification could be set as the proposed amendment provides. In the event a Justice on the Court at the time of ratification were still on the Court at the time specified for the termination of his term, he could be deemed to have been appointed to a new 18-year term (and, in theory, 18 years later, to yet another 18-year term). A drawback of this approach is that it would postpone for a number of years the time when Presidents would have roughly equal power in shaping the Court.

131. For example, instead of requiring retirement for the most senior Justice in the third odd-numbered year following ratification, retirement might be forced in the eighth odd-numbered year following ratification. This would assure the most senior Justice approximately 15 years of service between ratification and forced retirement, and the most junior Justice would be assured some 31 additional years. *Compare* chart *supra* at note 60. The cost of this modification is that it would defer by 10 years realization of the benefits of the proposed amendment.

132. *See supra* note 128.

133. A period of at least 22 months would have to elapse between the effective date of the proposed amendment and the presidential election next preceding the forced retirement of the most senior Justice. For example, if the proposed amendment had taken effect on December 31, 1986, the most senior Justice would have been forced to retire on August 1, 1991. The President elected in November 1988 would have appointed the successor. Note that if ratification occurred

it would be difficult to predict, at the time of ratification, what President would name the replacement of even the most senior Justice. The identity of the President to name the replacement of less senior Justices would be increasingly speculative.¹³⁴ Finally, it should be observed that it is all but certain that all Justices on the Court at the effective date of the proposed amendment would be assured terms considerably in excess of eighteen years.¹³⁵

D. Reappointment

1. Protection of the Court's Independence

The proposed amendment would bar reappointment¹³⁶ of all Justices, whether they were appointed as full-term or successor Justices.¹³⁷ The reason for this provision is protection of the independence of the Court. If a Justice desired reappointment, he might attempt to placate the President or others who might secure him a seat on the Court at the expiration of his term, or thereafter.¹³⁸

Barring reappointment is subject to several objections. The most obvious of these is that depriving the Court of an experienced Justice, who is politically acceptable to a President otherwise entitled to appoint whomever he wishes (subject to Senate confirmation), is a high price to pay as a purely prophylactic measure. It might be argued convincingly that most Justices would decide cases in a consistent and principled manner, based on the particular Justice's view of the Constitution. If the Justice's performance so pleased a President that the President decided to expend one of his two appointments, arguably that would be entirely appropriate. Moreover, notwithstanding life tenure, the problem is already present in the federal judiciary. Under the present system, and surely under the proposed amendment as well, the courts of appeals are major sources for Supreme Court appointees;¹³⁹ judges inclined

closer to the 1988 election, in either 1987 or 1988, the most Senior Justice would not be forced to retire until 1993, and his successor would be named not by the President to be elected in 1988, but by the President to be elected in 1992.

134. If, for example, the proposed amendment were ratified in 1987, the most junior Justice would be forced to retire in 2009, and his successor would be named by the President to be elected in 2008.

135. See the chart *supra* at note 60.

It is theoretically possible that the proposed amendment could provide some Justices terms of considerably less than 18 years. Suppose that during the year 1988 all nine Justices resigned and were replaced, and that the proposed amendment were then ratified on December 31, 1988. The most senior Justice, who would have been on the Court only a matter of months at the time of ratification, would be forced to retire in the summer of 1993, after service of some five years. Six more Justices would be limited to terms of from seven to 17 years. (It will be observed that under this bizarre hypothetical situation, the case for rapid forced retirements would be very strong, since it is probable that all nine Justices would have been appointed by the same President.)

136. Reappointment would never be permitted, either immediately at the end of the Justice's term or after an interval following service on the Court. See § 7 of the proposed amendment.

137. Reappointment of Justices on the Court at the effective date of the proposed amendment also would be barred. *Id.*

138. The Justice would not even be required to bend his view of the Constitution to that of the President in office at the time the Justice's term ended. He could seek to foster or maintain credentials with the party out of power. For example, if the term of a Republican Justice expired when a Democrat were President, the Justice might find it difficult or distasteful to tailor his behavior on the Court to suit that President. Instead, he might more easily and more successfully act on the Court in a way designed to encourage the next Republican President to return him to the Court.

139. Twenty-three Justices were sitting judges on inferior federal courts at the time of their appointment to the Supreme Court. H. ABRAHAM, *supra* note 27, at 53. Four of the nine members of the present Court were appointed directly

to tailor their decisions in order to secure Supreme Court appointments may do so in those fora,¹⁴⁰ and yet those judges are not barred from appointment to the Supreme Court. It might be argued that permitting reappointment to the Supreme Court would pose no greater danger to judicial independence.

Nevertheless, barring reappointment seems a worthwhile precaution. The purpose of life tenure in the federal courts under the present system is protection of independence of decision on that particular court, notwithstanding recognition of the possibility of being named to a higher court. Supreme Court decisions are far more important than are those of inferior federal courts; consequently, it may be appropriate to take sterner measures to protect independence on the Supreme Court.

One other possible argument in favor of allowing reappointment can be quickly dismissed. For many positions, it might be difficult to obtain a qualified person for a position of limited tenure. This argument could not be put forward seriously regarding an appointee as either a full-term Justice or a successor Justice who would serve a significant number of years,¹⁴¹ since it cannot be supposed that many people would turn down such an important and prestigious position because of a fear of being turned out many years in the future. It might as well be argued that qualified people do not seek the Presidency because the job cannot last more than eight years.

On the surface, a more plausible argument might be made that it would be difficult to attract successor Justices of the highest quality to a position of short duration, if reappointment were barred. When one considers the prestige of the United States Supreme Court in the American legal community, the argument sinks of its own weight. Federal and state judges, American Bar Association past presidents, and such lesser lights as law school deans and professors, would form a very long line for the privilege of serving for a week,¹⁴² not to speak of a year or two.¹⁴³

from a circuit court of appeals. Justices Marshall, Blackmun, Stevens, and Scalia were, respectively, judges on the Courts of Appeal for the Second, Eighth, Seventh, and District of Columbia Circuits.

140. Professor Macey, who finds the process "commendable," opens with the following language a discussion of efforts of judges hoping to be appointed to the United States Supreme Court:

Everybody knows that for you to get a promotion, the boss must be happy with your work. This appears to hold true in the process that will decide who will fill the next U.S. Supreme Court vacancy. Frank Easterbrook, Richard Posner, Robert Bork, and Antonin Scalia are the four federal appeals court judges most widely perceived to be in contention. In their recent opinions and scholarly writings, each of these men is now sending President Reagan subtle but unmistakable signals, through slight changes in philosophy, that he is the man for the job.

J. Macey, *Conservative Judgment Time*, Wall St. J., Aug. 23, 1985, at 14, col. 4.

141. The whole issue of reappointment is less likely to be a factor in the case of Justices who have served a full 18 years, or close thereto. It is likely that the Justice would by then be old enough that a President would be reluctant to use one of his two full-term appointments. See *supra* notes 75-82 and accompanying text. Appointment of a former Justice as a successor Justice presents somewhat different considerations. See *infra* notes 142-49 and 155-58 and accompanying text.

142. The shortest possible appointment could run from the morning of January 20, immediately before the appointing President left office, until the following August 1. If the newly inaugurated President immediately filled the same position, the term of office of the newly appointed Justice would run until 18 years from the following August 1. See § 5 of the proposed amendment.

143. It might not be worthwhile to name a successor Justice who would serve less than one year. First, assuming the usual screening process and Senate confirmation proceedings, a large portion of the year might be consumed in seating the new Justice. (The procedures might be streamlined in the case of a successor Justice who would serve a very short period.) Second, even after being seated, the Justice could not immediately become an effective part of the Court. He

2. *The Special Case of the Short-Term Successor Justice*

As discussed earlier,¹⁴⁴ the most serious threat to the Court's independence posed by the proposed amendment lies in the case of a successor Justice named to serve out a short period of an unfinished term. The most serious danger of a lack of independence would arise where the Justice, after completing his stint on the Court, hoped to obtain appointment to another position from the same President who named him to the Court.

The proposed amendment deals with this problem by providing, in effect, for automatic reappointment of a Justice whose term otherwise would expire during the term of office of the President who appointed him.¹⁴⁵ Since the President would not have the option of not reappointing the Justice so named, the Justice's independence from his first day on the Court would be assured.

It is possible, however, that the successor Justice would be appointed to a term of office scheduled to end during the immediately following presidential term. In that case, if the President were reelected, the Justice might leave the Court while the President who had appointed him was still in office.¹⁴⁶ It would be a very simple matter to provide a mandatory eighteen-year extension of the Justice's term in that case as well.¹⁴⁷ Such a formulation would certainly be an acceptable alternative to the actual provision in the proposed amendment.

The reason this alternative was not selected is based on the value of predictability. If a President were to name a successor Justice to a term scheduled to expire during the term to which the President already had been elected, the President would know at the time of appointment that he was naming a Justice to a term of approximately twenty years. Assuming the President wished for his appointment to have continuing importance on the Court, he would tend to name a person of, for example, not over sixty years of age, and might very well choose someone considerably younger.

If the appointment were to expire in the following presidential term, for example in four years, under the actual wording of the proposed amendment the President would know that the term of whomever he appointed would expire in four years. The President might well choose a person aged seventy. Under the alternative, the President would not know whether he was appointing the successor Justice to a term of four or twenty-two years. If the President were reelected, the alternative formulation would automatically extend the successor Justice's term to twenty-two

would face not only the usual difficulties of starting in any new and demanding position, but in addition, argument would already have been heard in many of the cases under consideration, and the new Justice therefore could take no part in their decision.

144. See *supra* notes 112-16 and accompanying text.

145. See § 5 of the proposed amendment and discussion *supra* at notes 113-15 and accompanying text.

146. To modify the hypothetical situation described in note 113 *supra*, suppose a successor Justice were appointed in 1993, by the President elected in 1992, to a term scheduled for expiration in 1997, and that the President were reelected in 1996. Since the Justice's term would not have been scheduled for expiration during the term of office of the President who appointed him, he would leave the Court in 1997, still during the presidency of the President who appointed him.

147. Section 5 of the proposed amendment could provide that the Justice's term would extend 18 years beyond the normal expiration date where it normally would expire "during the presidency," rather than "during the current term of office," of the President by whom he was appointed.

years; if he were not reelected, the successor Justice's term would end in four years.¹⁴⁸ While the President might be inclined to appoint, let us say, a judge aged seventy to a four-year term, such an appointment would seem inappropriate for a twenty-two-year term. If the President desired that his appointment result in maximum influence on the Court for as long as possible (and since it is not unlikely that the President would optimistically expect reelection), the President would probably opt for a younger nominee. In the writer's view, while this is a close question, the alternative's potential for skewing appointments in the direction of youth outweighs the slightly increased risk of a Justice not taking an independent stance.¹⁴⁹

E. Further Protection of the Court's Independence

The proposed amendment might be modified in a number of ways in order to protect further the Court's independence. Several of these alternatives, which are not mutually exclusive, are discussed below.

1. Promotion to Chief Justiceship

The proposed amendment explicitly allows the President to promote an Associate Justice to the Chief Justiceship.¹⁵⁰ It has been argued that even under the present system of life tenure, the Court's independence would be better protected if an Associate Justice could not be promoted to the Chief Justiceship.¹⁵¹ This step would remove any temptation for an Associate Justice to try to curry favor with the President in order to secure promotion to the Chief Justiceship.¹⁵²

The proposed amendment could easily be modified to prevent the promotion of an Associate Justice, but there are arguments against doing so. The difference in the duties of the Chief Justice and those of an Associate Justice are largely administrative,¹⁵³ and it may be deemed efficient to assign those duties to a person already

148. Two other possibilities must be rejected. First, to use the figures in the example in the text, the successor Justice should not be given a term of 22 years automatically. If the President making the appointment were not reelected, realization of the political benefits toward which the proposal is directed requires that the newly elected President should designate a Justice for the full 18-year term.

Second, the President appointing the successor Justice should not have an option of reappointing the successor Justice if he (the President) were reelected. The possibility of reappointment creates the greatest possible danger of undermining the independence of the Court.

149. It can be argued that the best assurance of an independent Court lies in encouraging the President to name an older successor Justice. This possibility is developed further *infra* at notes 155-58 and accompanying text.

150. See § 6 of the proposed amendment.

151. See Note, *Extrajudicial Activity of Supreme Court Justices*, 22 STAN. L. REV. 587, 611 (1970).

152. It might be feared that "Justices who seek administrative positions or the Chief Justiceship may tend to vote in certain ways to please those who can confer these honors." *Id.* at 594.

One might point to the close association of Justice Fortas with President Johnson, who attempted to promote Fortas to succeed Chief Justice Warren. Despite the close association, it does not necessarily follow that Justice Fortas altered his performance on the Court in order to secure the promotion. See H. ABRAHAM, *supra* note 27, at 263.

153. The Chief Justice's administrative duties extend beyond the Court to the entire federal court system. The Chief Justice has certain nonadministrative prerogatives that directly affect the substantive output of the Court. In addition to presiding in open sessions and in the Justices' conferences, the Chief Justice assigns the writing of the Court's opinion when he is in the majority. W. LOUTHAN, *THE POLITICS OF JUSTICE* 51 (1979). Since the Court's explanation of a decision is frequently more important than the decision itself, this influence can be important. Nevertheless, the opinion as written will not in fact constitute the opinion of the Court unless a majority of the Court accepts it.

familiar with the workings of the Court. This reason, when coupled with a reluctance to propose changes in the present system where it is not clearly beneficial to do so, leads the writer to propose continuation of the present system.

2. Restricting Post-Court Activities

Even under the life tenure system, it has been suggested that Justices be barred from political positions for a considerable period after leaving the Court.¹⁵⁴ This seems to be a good idea. However, the exact scope of the limitation can best be spelled out in legislation rather than in a constitutional amendment.

3. Minimum Age for Justices

In the writer's view, the proposed amendment would not significantly affect the Court's independence.¹⁵⁵ However, some may not share that view. The primary area of concern would involve Justices, especially successor Justices, forced to leave the Court before normal retirement age. Anticipation of a post-Court appointment or other career might affect the Justice's actions on the Court and thereby undermine the independence of the Court.

Assuming this potential problem were viewed as significant, it would seem to be largely solved if no Justices would be forced off the Court before normal retirement age. This could be accomplished by a minimum age provision, which would be keyed to the Justice's age at the conclusion of his term on the Court. For example, the proposed amendment could include a provision requiring that at the time of appointment the Justice be of sufficient age so that he would be at least sixty-five years of age when his term on the Court ended.¹⁵⁶ This would mean that no full-term Justice younger than age forty-seven could be appointed. Such a provision seemingly would constitute little restriction on a President's freedom of choice, since only sixteen Justices younger than forty-seven years of age have been appointed in the history of the Court,¹⁵⁷ and only three of these during the twentieth century.¹⁵⁸ The provision would be much more restrictive of a President's choice of a successor

154. The author of Note, *supra* note 151, would bar any former Justice from appointive or elective office for a period of five years after leaving the Court. In proposing "a monastic life for Justices," the Note's author also would bar a Justice while on the Court from consulting with or doing any work for any member of the government. *Id.* at 603, 610-11. Probably the most dramatic instance in history of a former Justice's political activity came in 1916, when Justice Hughes left the Court and took the Republican nomination for the Presidency. Hughes said in 1916 and later that he did not want the nomination, and this may have been a rare instance of a true "draft." Hughes was acutely aware of the questionable propriety of a Justice's involvement in politics: "The idea of a Justice of the Supreme Court taking part in politics, promoting in the slightest degree his selection as a candidate for the office of President, was abhorrent to me." *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* 178 (D. Danelski and J. Tulchin, eds. 1973).

155. See *supra* notes 104-16 and accompanying text.

156. It might appear that a provision could be added that would assure that no Justice would be forced off the Court before age 65, regardless of his age when appointed. This would undermine the political benefits of the proposed amendment. If a President named a Justice younger than 47 years of age to a full term on the Court, the Justice could serve more than 18 years, at the expense of the President in office 18 years later. Although not many Justices younger than 47 are appointed to the Court, see *infra* note 157 and accompanying text, the concern would be considerably greater in the case of a successor Justice, who might very well be less than 65 years of age when his term expired.

157. R. HODDER-WILLIAMS, *supra* note 29 at 183-85.

158. See *supra* note 81.

Justice. For example, under the alternative provision as stated above, a successor Justice named to a five-year term could not be younger than sixty years of age when appointed. It is a close question whether the resulting increased protection of the Court's independence merits such a degree of restriction on a President's freedom of action in filling a vacancy on the Court.

4. Automatic Post-Court Positions for Justices

The alternatives discussed above all seek to assure a Justice's independence of action by reducing the possibility of reward for acting on the Court in a way desired by the President or others. Thus, Justices would see foreclosed the possibility of promotion to the Chief Justiceship, or of a post-Court elective or appointive office or, under the last alternative discussed above, the foreclosure would be expected to result from the Justice's age. The theory is that if responsible public positions are to be denied him in any event, a Justice will not sacrifice his independence in pursuit of such positions.

Another way of providing assurance of a Justice's independence while on the Court would be *automatically* to assure him a responsible position upon leaving the Court. The most reasonable position would be as a judge on a Circuit Court of Appeals,¹⁵⁹ which position¹⁶⁰ would still be life tenured. Since all Justices on the Supreme Court would be assured, for life, of highly prestigious judicial roles, it is difficult to see how their independence of action while on the Court could be in any

159. A complicating factor in specifying a former Justice's automatic right to join a circuit court of appeals is that the present Constitution does not establish those courts, but only empowers Congress to create such inferior federal courts as it chooses. U.S. CONST. art. III, § 1. By implication, this power may carry with it the power to abolish such courts. Professor Rice, for example, has stated that "[t]here is no question but that Congress has the power to define or even entirely eliminate the jurisdiction of the lower federal courts," and that "in theory, Congress could abolish the lower federal courts." Rice, *Congress and the Supreme Court's Jurisdiction*, 27 VILL. L. REV. 959, 960 (1981-82); *Symposium Proceedings*, 27 VILL. L. REV. 1042 (1981-82). But compare Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 501-13 (1973-74). Mr. Eisenberg argues that whatever may have been the proper interpretation of Article III, section 1 when the Constitution first was adopted, Congress now could not constitutionally abolish the lower federal courts.

The proposed amendment could establish a direct constitutional basis for courts of appeals, but that seems a major change indeed if the purpose is to secure a post for a Justice forced to leave the Supreme Court. A solution might be for the proposed amendment to provide that the former Justice automatically would become a member of the highest federal court, other than the Supreme Court, with jurisdiction over the Justice's place of residence at the time of his appointment to the Supreme Court. (See *infra* note 160 for other methods of determining which court of appeals a former Justice would join.) Such a provision would assure the former Justice a place on an appropriate court of appeals under the current arrangement of inferior federal courts. If the inferior federal courts were restructured, the provision would route the former Justice to the most appropriate inferior federal court.

160. The mechanics of this provision could be arranged in various ways. The President could select the circuit to which the former Justice would be assigned. The Justice might automatically be assigned to the circuit of which he had been Circuit Justice. (In the case of a Justice serving as Circuit Justice for two circuits, either the President or the Justice could be designated to decide which of the circuit courts the Justice would join.) The Justice might be assigned to the circuit court of the circuit where he had resided at the time of appointment. (For many former Justices, this would mean returning to service on the same court of appeals on which they had served before being named to the Supreme Court. See *supra* note 139.) It is suggested that allowing the Justice to select any circuit court could result in an excessive proportion of former Justices deciding to join the Court of Appeals for the District of Columbia.

Administratively, the former Justice could simply constitute an additional judge on the circuit court. Alternatively, his assumption of this position could mean that the next vacancy on the court would not be filled, thereby returning the court to its former size.

way more secure than with life tenure on the Court itself.¹⁶¹ At the same time, the political benefits of the proposed amendment would be secured.

F. *Abolition of Life Tenure for Inferior Federal Judges*

All "Article III" federal judges enjoy life tenure.¹⁶² The proposed amendment deals only with the tenure of Supreme Court Justices, leaving intact the present system with regard to inferior federal judges. This approach does not arise from a view that life tenure for inferior federal judges is in the societal interest, but rather that the case for abolition of life tenure is less clear than in the case of Supreme Court Justices. Detailed evaluation of life tenure for inferior federal judges is beyond the scope of this Article. The purpose of this section of the Article, however, is to discuss briefly certain factors which might lead one to conclude that tenure for inferior federal judges and for Supreme Court Justices are two distinct issues, which logically could be treated differently.

1. *Less Clear Political Benefits*

First, the political benefits of ending life tenure are neither as important nor as clearly achieved in the case of the inferior federal judiciary as in the case of Supreme Court Justices. It is true that, as in the case of Supreme Court Justices, Presidents may have a preference for appointing young inferior federal judges,¹⁶³ and that many of those judges may have an interest in the identity of their successors.¹⁶⁴ On the other hand, while inferior federal judges clearly are important political actors, their primary function is to decide cases rather than make fundamental policy choices for society. Debated questions of great societal importance invariably will be appealed following a district judge's decision and, at least if the circuit courts of appeal are unable to agree, may well not be resolved at that level either.

Retirement decisions of inferior federal judges would seem less likely to be tainted by a desire to influence future judicial decisions than would those of Supreme Court Justices. Decisions of district court judges can be appealed of right. Appeals court judges normally hear cases in panels, and the most important cases are likely to be decided by the Supreme Court. Since no single inferior federal judge is likely to believe that the course of American law will be greatly altered by his retirement decision, it is unlikely that retirement decisions at that level frequently will be based on the desire that a like-minded President appoint the judge's successor. Moreover, the fact that hundreds of inferior federal judges are involved, rather than only nine Supreme Court Justices, makes it likely that those retirement decisions that are based on this factor will tend to balance each other.

161. It also would be necessary to establish a mechanism to ensure appropriate retirement pensions for Justices. Presumably Justices would be allowed, if nothing else, to assume senior status when they were forced to leave active status on the Court. In this manner (if in no other) all individuals appointed to the Court would be assured of receiving full salary for life, so long as they were willing to accept the restrictions of senior status.

162. U.S. CONST. art. III, § 1. See *supra* note 9 with respect to the question of whether life tenure is required by the constitutional language.

163. For example, more than 10% of President Reagan's judicial appointees are under the age of 40. Friedman and Wermiel, *supra* note 24, at 11, col. 3.

164. See *supra* notes 48 and 55.

Finally, the large number of federal judges tends to assure that the relative power of Presidents to shape the inferior federal judiciary will not be greatly different due to the random pattern of deaths and retirement decisions.¹⁶⁵ With large numbers, the statistical probability of random factors making a significant difference is greatly reduced.¹⁶⁶

2. Complexities and Disadvantages

Not only are political benefits of applying the approach of the proposed amendment to the inferior federal judiciary less clear than in the case of Supreme Court Justices, there may be additional costs. It seems likely that application of the approach of the proposed amendment to the inferior federal judiciary would be attended by complexities and disadvantages not present in the case of Supreme Court Justices.

The number of inferior federal judges is not constant. While the Supreme Court has consisted of nine Justices since 1866,¹⁶⁷ the inferior federal judiciary has been expanded on many occasions to deal with an increased caseload. If this trend were to continue in the future, it would be difficult to employ the fine-tuned approach of the proposed amendment in order to give each President roughly equal power in shaping the inferior federal judiciary.

Obviously, it would be possible to establish a term of eighteen years for inferior federal judges,¹⁶⁸ and provide that where a judge did not complete his term the successor would only fill out the uncompleted term. In this situation, however, it might prove difficult to secure the same high quality of federal judges as at present.

165. The relative power of Presidents to shape the inferior federal judiciary may be affected greatly by Congress. For example, Congress created a large number of new inferior federal judgeships in 1978, through passage of the Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629. This enabled President Carter to name a much larger number of such judges than otherwise would have been the case. Professor Baar gives the following political explanation for what he terms "the erratic nature of the Judgeship creation process":

[T]he need for judgeships grows relatively continuously, but the legislative action necessary to create them is often delayed. Thus, judgeships are added in large increments after long intervals. The delay is easily explained: the appointment of judges is a presidential power subject to Senate confirmation, and judgeships are usually awarded to members of the president's political party; a Congress dominated by one party is hesitant to create judgeships for a President of a different party.

C. BAAR, JUDGESHIP CREATION IN THE FEDERAL COURTS: OPTIONS FOR REFORM 1 (Federal Judicial Center 1981). Unfortunately, the approach of the proposed amendment would not cure this problem. See *infra* text at note 167.

166. Suppose all resignation decisions were based solely on random factors, and that during a given period of time there were a 50% chance that any given Supreme Court Justice or inferior federal judge would leave the bench for any reason. With only nine Supreme Court Justices, the chances that approximately half the Justices would leave the Court during the period are not overwhelming. The probability that between 44.44% and 55.56% of the Justices (*i.e.*, four or five Justices) would leave the Court would be only 252 of 512, or approximately 49%. By contrast, the probability that between 45% and 55% of the approximately 750 inferior federal judges would leave the bench would be in excess of 99%. See D. GROEBNER & P. SHANNON, BUSINESS STATISTICS: A DECISION-MAKING APPROACH 173-83, 235-38 (2d ed. 1985). The author is indebted to Professor Kenneth Galchus of the UALR Department of Economics for applying the complex binomial probability distribution formula to the computation for inferior federal judges. (Some may find this point easier to grasp by considering the simple case of flipping a coin. If the coin were flipped 10 times, one would not be surprised if it landed on "heads" six or seven or even eight times. If the coin were flipped 1,000 times, however, it would be amazing if "heads" resulted even 600 times.)

167. In 1866, Congress abolished one seat on the Court, reducing from 10 to nine the number of Justices. See *supra* note 121.

168. The necessity of establishing a term of precisely 18 years would not be present in the case of the inferior federal judiciary. See *supra* notes 117-23 and accompanying text for a discussion of the selection of 18 years as an appropriate term for Supreme Court Justices.

Particularly in the case of appointments for relatively short periods of time, the best and brightest of the bar might be reluctant to make the financial sacrifice entailed in accepting the appointment.¹⁶⁹

Finally, it is possible that the independence of the inferior federal judiciary could be significantly harmed if life tenure were abolished. This concern may be greater in the case of inferior federal judges than with respect to Supreme Court Justices. For one thing, unlike Supreme Court Justices, district court judges frequently preside over proceedings involving attorneys with whom they have close social connections. This may be troubling in itself, but the problem surely would be exacerbated if the judge were also forced to consider the possibility of his future professional association with some of the attorneys appearing before him.

The proposal does not endorse life tenure for inferior federal judges, but merely is silent on the subject. It may well be that society would be better served if life tenure were abolished for inferior federal judges pursuant to some formulation other than the proposed amendment. The concerns expressed in this section are put forward only to suggest that a different analysis is necessary, and that different conclusions may be reached.

VII. CONCLUSION

Life tenure for Supreme Court Justices should be abolished, and replaced by a system of fixed, staggered, eighteen-year terms. If a Justice fails to complete his term, the successor Justice should be appointed only to serve out the term of the Justice whom he replaced. The change should be made gradually, in order to avoid the appearance, if not the fact, that the proposed amendment was simply a device for forcing particular sitting Justices to leave the Court.

Such an approach, which would be accomplished by a constitutional amendment, would provide major benefits. A President would not be tempted to name very young Justices in order to secure long-term influence on the Court, and much more significantly, a Justice would have little incentive to make his retirement decision based, in part, on a desire to influence the identity of his successor. Most important, the major political power of shaping the Court through appointments would no longer be distributed among Presidents on a basis that can be no better than random.

These benefits could be obtained without sacrificing the Court's independence. Any reduction of independence under the proposal would be minimal and, if even this were viewed as objectionable, could be reduced virtually to nil by minor alterations in the proposal. Only inertia stands in the way of a better and more rational system of determining the composition of the United States Supreme Court.

169. To a lesser degree, this would be true of a system of fixed appointments of 18 years for every inferior federal judge, with no special provision for successor judges. Even under the present practice of life tenure, there is concern that many successful attorneys are unwilling to accept the financial sacrifice of service as a federal judge. See Chapin, *The Judicial Vanishing Act*, 58 JUDICATURE 160 (1974).